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In The

Supreme Court of the United States

JANICE BREWER,
in her official capacity as Secretary of State of Arizona,

Petitioner,

vs.

RALPH NADER and DONALD N. DAIEN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

TERRY GODDARD
Attorney General of Arizona
MARY R. O'GRADY*
Solicitor General
BARBARA A. BAILEY, *of counsel*
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007-2926
(602) 542-3333

**Counsel of Record* *Counsel for Petitioner*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Did the Ninth Circuit err in holding – in conflict with the Eighth Circuit – that Arizona's requirement that candidate nomination petition circulators be residents of the State was subject to strict scrutiny and failed to meet that standard under *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), in which the Court expressly left open the question?

Did the Ninth Circuit err in holding – in conflict with the Arizona Supreme Court – that Arizona's nomination petition filing deadline for independent presidential candidates is subject to strict scrutiny review under *Anderson v. Celebrezze*, 460 U.S. 780 (1983), in absence of a showing that the filing deadline imposes any burden – severe or otherwise – on the candidate?

PARTIES TO THE PROCEEDING

The Respondents are the Plaintiff-Appellants Ralph Nader and Donald N. Daien. This petition refers to them collectively as "Respondents."

The Petitioner is the Defendant-Appellee Janice Brewer, Arizona Secretary of State. The petition refers to her as the "Secretary."

The Complaint also named as plaintiffs Peter Camejo and Kendle H. Greenlee, who were dismissed before summary judgment was granted in the district court and who were not parties to the appeal below. Dorothy Schultz intervened in the district court and was dismissed before summary judgment was granted. Intervenor Schultz was not a party to the appeal below.

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The decision of the Ninth Circuit Court of Appeals is reported: *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008). It is included as Appendix A.

The decision of the district court is unreported: *Nader v. Brewer*, No. CV-04-1699-PHX-FJM, 2006 WL 1663032 (D. Ariz. June 8, 2006). It is included as Appendix B.

The order of the Ninth Circuit denying the petition for panel rehearing and for rehearing en banc is included as Appendix C.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its panel decision on July 9, 2008. The Ninth Circuit denied Defendant-Appellee's Petition for Panel Rehearing or Rehearing En Banc on August 15, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the

press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Arizona Revised Statutes (A.R.S.) §§ 16-101, 16-311(A), 16-321, and 16-341 are set forth in Appendix D.

STATEMENT OF THE CASE

The Arizona Secretary of State asks the Court to grant certiorari to settle a dispute among the federal courts about whether state residency requirements for circulators of petitions are subject to, or survive, strict scrutiny review. The Secretary seeks review of the Ninth Circuit's holding that Arizona's requirement that petition circulators be qualified to register to vote in Arizona imposes a severe burden on speech and therefore is subject to strict scrutiny. The Court also should review, if necessary, the court of appeals' holding that Arizona's residency requirement is not narrowly tailored to achieve a compelling state interest.

The Secretary further asks the Court to grant certiorari to resolve a conflict resulting from a separate holding of the Ninth Circuit, which struck down Arizona's nomination petition filing deadline with regard to independent presidential candidates. The court of appeals' decision directly conflicts with a decision of the Arizona Supreme Court, which upheld

the requirement under the principles set forth by this Court in *Anderson*.

A. Material Facts.

In Arizona, candidates for any office have four options for getting on the ballot. One of those options is to run as an independent candidate. In the case of presidential candidates, the governing statutes include provisions that pertain to presidential electors, who, in turn, elect the candidate of their choice. A.R.S. § 16-341(G). Independent candidates must obtain signatures on nominating petitions to establish a modicum of support for their candidacy. Under Arizona law, the required number of signatures for presidential candidates is three percent of the number of registered voters who are not registered as members of a recognized political party. *Id.* § 16-341(E). In 2004, the number of signatures needed to support an independent presidential candidate was 14,694. (App. A at 5a.)

There is no limitation on when either independent or party candidates may begin collecting signatures for their nominations. They all must file their nominating papers at least ninety days, and no more than 120 days, before the primary election. A.R.S. §§ 16-341(C), 16-311(A), 16-344(A).[1] In 2004, that

[1] In the case of presidential electors, recognized parties are not required to obtain nomination signatures but instead must appoint candidates for the office of presidential elector and file

(Continued on following page)

filing deadline fell on June 9, 2004. (App. A at 6a.)[2] Signatures on nomination petitions must be those of registered voters. A.R.S. § 16-321(B). Those signatures must be verified by a person before whom they were written. *Id.* § 16-321(D). Any person may circulate nominating petitions to place his or her candidate of choice on the ballot; the signatures must be witnessed and verified, however, by a person qualified to register to vote. *See id.* To be qualified to register to vote in Arizona, a person must be, among other things, a resident of the State twenty-nine days preceding the election. *Id.* § 16-101.

Within ten court days after the filing deadlines, an elector may challenge the nominations. *See id.* § 16-351(A) (setting out the procedures for judicial challenges to nominations). Under those procedures, a judicial challenge may be heard and decided in the superior court within approximately four weeks after the filing deadline. *Id.* If the matter is appealed, the state supreme court must decide the matter "promptly." *Id.*

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nomination papers for each candidate with the Secretary by the same deadline as for other candidates. A.R.S. § 16-344(A).

[2] The primary election fell on September 7, 2004, and the general election fell on November 2, 2004. (App. A at 6a.) At the time this case was brought, state law provided that the primary election date was to be held on the eighth Tuesday before the general election. *See* A.R.S. § 16-201 (2006). A 2007 amendment to that provision moved the State's primary election to the ninth Tuesday before the general election. *See* Ariz. Sess. Laws 2007, Ch. 168, § 1 (amending A.R.S. § 16-201).

Ballots must be printed and distributed in time for early voting, which begins thirty-three days before the general election. *See id.* § 16-545(B). Early voting for the general election began on September 30, 2004. (App. A at 6a.) Sample ballots must be printed no later than forty-five days before the election. A.R.S. § 16-461(A). In 2004, the deadline for proofing and finalizing the ballot for the general election was September 18, 2004. (App. A at 6a.) The special paper for the ballots is ordered well before the September proofing deadline, and the preparation of that ballot begins in August and is completed shortly after the primary election. (Dkt. 46, ex. 3, ¶¶ 10, 19.) The printing of the general election ballots is completed on a tight deadline, which also must incorporate time within which to translate the ballots into Spanish. (*Id.*, ¶ 14.) In 2004, the candidate filing deadline fell 113 days before voting began in the general election. (Dkt. 59 at 8 [App. B at 12b].)

Nader ran for President and was on the ballot in Arizona in 2000 as a third party candidate. (Dkt. 1 [Complaint], ¶ 5.) In 2004, Nader again sought to get on the Arizona ballot, this time as an independent presidential candidate. (App. B at 1b.) Although he announced his candidacy in February 2004, his campaign did not attempt to gather any signatures to support his candidacy until April. (*Id.* at 12b-13b.) His campaign gathered more than ninety percent of its signatures within the two-week period immediately preceding the June 9th deadline for filing nomination petitions. (*Id.* at 13b.) Shortly after he

filed his nomination petitions, Nader's nomination was challenged in the Arizona Superior Court of Maricopa County. (*Id.* at 1b-2b.) The challengers claimed that, of the approximately 21,185 signatures on the petitions filed by Nader, 15,467 of them were invalid. (App. B at 1b; dkt. 46, ex. 11, ¶¶ 112-113.) Nader withdrew his petitions based on his statement that he had failed to collect a sufficient number of signatures to place his name on the ballot. (App. B at 2b.) Nader withdrew his candidacy in Arizona on July 2, 2004. (App. A at 7a.)

B. Course of Proceedings.

On August 16, 2004, Nader, along with his vice-presidential running mate, a Texas elector, and an Arizona elector, sued the Secretary in this case under 42 U.S.C. § 1983 for alleged violations of the First and Fourteenth Amendments. (Dkt. 1 [Complaint], ¶¶ 1-6.) The plaintiffs challenged Arizona's law providing that nomination petitions for candidates, which include independent candidates for President, be filed no fewer than ninety days before the primary election. (*Id.*, ¶ 13 (citing A.R.S. § 16-311), ¶ 17.) The plaintiffs also challenged Arizona's law providing that only persons qualified to register to vote in Arizona (and who therefore were residents of the State) are permitted to verify nomination petition signatures. (*Id.*, ¶¶ 14-16.)

The plaintiffs sought a preliminary injunction to order that Nader's name be placed on the Arizona

ballot as a presidential candidate for the 2004 election. (*Id.* at 11-12, ¶¶ (2), (3).) The district court denied the preliminary injunction and the 2004 election proceeded without Nader as a candidate in Arizona. The Ninth Circuit affirmed that order. *Nader v. Brewer*, 386 F.3d 1168 (9th Cir. 2004). Following the preliminary injunction proceedings, two of the plaintiffs – the vice-presidential candidate and the Texas elector – sought and were granted dismissal from the case. (Dkt. 44.) The remaining parties subsequently filed cross-motions for summary judgment. (Dkt. 45, 47.) The district court denied Nader's motion and granted the Secretary's motion on June 8, 2006. (App. B.)

The district court reviewed the filing deadline and circulator residency requirements under the principles set forth in *Anderson* and *Meyer v. Grant*, 486 U.S. 414 (1988). The court acknowledged that circulating petitions for ballot access involves "core political speech" under *Meyer*. (App. B at 5b.) The court further explained that *Anderson* requires courts to review ballot access regulations by weighing the "character and magnitude of the asserted injury" to the plaintiffs' rights against the "precise interests put forward by the State as justifications" for the burden imposed. (*Id.* at 5b-6b (*quoting Anderson*, 460 U.S. at 789).) The court also noted that only severe restrictions on First Amendment freedoms are subject to strict scrutiny; whereas slight burdens should generally be upheld if rationally related to a legitimate interest. *Id.* at 6b.

The district court initially noted that Nader failed to offer any evidence to establish the significance of the burden imposed by either the residency requirement or the filing deadline. (*Id.* at 2b n.1.) The court also noted that, given that independent candidates have access to approximately 3.7 million Arizona residents who are eligible to circulate petitions, any burden on the rights of Nader or his supporters was limited and justified by the State's compelling interest in protecting the integrity of the election process. (*Id.* at 9b.) Even under a strict scrutiny review, however, which would have been warranted had Nader shown a severe burden, the district court found that both of the challenged regulations were narrowly tailored to achieve the State's compelling interests. (*Id.* at 8b-13b.) With regard to the requirement that individuals who verify petition signatures be state residents, the court found that Arizona had a compelling interest in protecting the petition circulation process from fraud and abuse and that the residency requirement ensures that circulators would be subject to the State's subpoena power to achieve that interest. (*Id.* at 8b-9b.) The court also found that Arizona's filing deadline was not more burdensome than necessary to achieve the State's compelling interest in allowing sufficient time to hear and resolve challenges to nominations and to print and distribute ballots in time for early voting. (*Id.* at 13b.)

The Ninth Circuit reversed. (App. A.) The court held that the circulator residency requirement imposed a severe burden as a matter of law under

Buckley because it necessarily decreased the number of potential circulators. (App. A at 16a.) The court acknowledged that the *Buckley* Court "expressly did not decide the validity of the separate residency requirement because it was not challenged in that case." (App. A at 15a.) The court further acknowledged that the Eighth Circuit "came to the opposite conclusion [from that of the Ninth Circuit] and upheld a residency requirement for initiative-petition circulators" in *Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614 (8th Cir. 2001). (App. A at 18a.) The Ninth Circuit held that the residency requirement did not withstand strict scrutiny because it found that the requirement was not narrowly tailored to achieve the State's interest of preventing fraud in the petition circulating process. (App. A at 20a.)

With regard to the filing deadline, the Ninth Circuit held that *Anderson* was controlling on the issue of the severity of the burden on Nader's rights and required a finding of a severe burden. (App. A at 22a.) The court further held that the absence of any independent presidential candidate on Arizona's ballot since 1993, when the filing deadline was shortened to seventy-five days before the primary election, "suggests that the regulations impose a severe burden that has impeded ballot access." *Id.* Accordingly, the Ninth Circuit applied strict scrutiny to the filing deadline requirement and held that the State did not show that it needed all of the statutorily allotted time to achieve the State's interest of preparing and

distributing ballots in time for the general election. (App. A at 24a-25a.)

Although not part of the record before the courts below, Nader successfully sought to get on Arizona's ballot as an independent presidential candidate in the 2008 general election.

REASONS FOR GRANTING THE WRIT

I. The Residency Requirement.

The Court should grant certiorari to resolve the conflict among circuits about whether state residency requirements for petition circulators are subject to strict scrutiny and, if so, whether those requirements withstand such scrutiny. In *Buckley*, the Court applied strict scrutiny to, and struck down, Colorado's requirement that circulators of initiative petitions be registered to vote. *Buckley*, 525 U.S. at 192 & n.12, 195. The Court expressly left open the question whether a requirement that such circulators be state residents is subject to the same scrutiny or whether it would withstand such review if strict scrutiny were applied. *Id.* at 197.

Since *Buckley*, both federal district and appellate courts and state courts have addressed the question left open in that case. The courts have reached differing conclusions regarding the appropriate standard of review of restrictions on the residency of petition circulators and whether such a requirement survives

strict scrutiny. That disagreement results in some States, but not others, being permitted to prevent fraud in the petition process by requiring that those who attest to the validity of the signatures on the petitions be state residents and thus be subject to the State's subpoena power.

The Ninth Circuit erred by holding that strict scrutiny must be applied to Arizona's residency requirement without evaluating the magnitude of the burden imposed by the requirement on Nader or his supporters.

A. The *Buckley* Court Expressly Left Open the Question Whether a Residency Requirement Is Constitutional.

In *Buckley*, the Court left open the question whether a requirement that individuals who circulate petitions be state residents is subject to strict scrutiny or would survive such scrutiny. The Court stated:

> In sum, assuming that a residence requirement would be upheld as a needful integrity-policing measure – a question we, like the Tenth Circuit, see 120 F.3d, at 1100, have no occasion to decide because the parties have not placed the matter of residence at issue – the added registration requirement is not warranted.

Buckley, 525 U.S. at 197.

In his concurring opinion, Justice Thomas stated that he assumed, as did the Tenth Circuit, "that the

State has a compelling interest in ensuring that all circulators are residents." *Buckley*, 525 U.S. at 211. He further stated that Colorado's voter registration requirement was not narrowly tailored because many Colorado residents were not registered voters "and the State's asserted interest could be more precisely achieved through a residency requirement." *Id.*

The Court thus not only left open the issue of the constitutionality of a state residency requirement for petition circulators, but suggested that such a requirement may be upheld as a "needful integrity-policing measure." *Id.* at 197, 211. Particularly given the split among federal courts that have addressed the issue, the Court now should decide the question left open in *Buckley*.

B. Federal Courts Have Reached Conflicting Decisions on Whether State Residency Requirements Are Subject to, or Survive, Strict Scrutiny.

The Ninth Circuit held that, although *Buckley* did not decide the constitutionality of petition circulator residency requirements, strict scrutiny of such a requirement was "mandated" by *Buckley* because the requirement necessarily reduced the number of individuals eligible to circulate petitions for a presidential candidate in Arizona. (App. A at 16a.) The Ninth Circuit disagreed with the district court's analysis, which weighed the severity of the burden

shown by the challenger against the interests of the State and justifications for the regulation.

The Ninth Circuit's decision deepens an existing circuit conflict on the issue of the constitutionality of state residency requirements. Like the Ninth Circuit, the Seventh Circuit applied strict scrutiny to, and invalidated, an in-district residency requirement for petition circulators that operated as a state residency requirement in a statewide race. *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000). The Tenth Circuit similarly applied strict scrutiny to a municipal residency requirement for petition circulators under the reasoning of *Buckley* and *Meyer*. *Chandler v. City of Arvada*, 292 F.3d 1236 (10th Cir. 2002). The *Chandler* court, however, acknowledged that the constitutionality of a state residency requirement was not the issue before it. *Chandler*, 292 F.3d at 1244.

Since the Ninth Circuit's decision, the Sixth Circuit applied strict scrutiny to, and invalidated, an Ohio law that, as applied, required that circulators of candidate nomination petitions be registered voters and Ohio residents. *Nader v. Blackwell*, No. 07-4350, ___ F.3d ___, 2008 WL 4722584 (6th Cir. Oct. 29, 2008). The court found that the residency requirement served no compelling state interest. *Id.* at *14.

The Eighth Circuit took a different approach and reached the opposite conclusion in *Jaeger*, which addressed North Dakota's state residency requirement for petition circulators. The *Jaeger* court upheld the requirement under *Buckley* because the

requirement did not "unduly hinder the circulation of petitions" and was a reasonable regulation designed to ensure the integrity of the petition circulating process. *Jaeger*, 241 F.3d at 615. In so holding, the *Jaeger* court followed the Supreme Court's "flexible" standard that applies strict scrutiny only where a severe burden has been shown and applies a lower level of scrutiny where "lesser burdens" are shown. *Id.* at 616 (*citing Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997)).

The Second Circuit applied strict scrutiny to, and struck down, a New York local residency requirement for nomination petition circulators. *Lerman v. Bd. of Elections*, 232 F.3d 135, 146-50 (2d Cir. 2000). The court stated, however, that the state's interest protecting the integrity of the signature collection process was served by the "less burdensome requirement[]" of a state residency requirement. *Id.* at 150.

Other courts either have upheld state residency requirements or have suggested that such requirements may be constitutional under *Buckley*. *See Hart v. Sec'y of State*, 715 A.2d 165, 167-68 (Me. 1998) (upholding a state residency requirement for petition circulators against a First Amendment challenge and analyzing the effect of *Meyer* and *American Constitutional Law Foundation, Inc. v. Meyer*, 120 F.3d 1092 (10th Cir. 1997), *aff'd by Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999)); *Kean v. Clark*, 56 F. Supp. 2d 719, 730-33 (S.D. Miss. 1999) (applying strict scrutiny to, and upholding,

Mississippi's state residency requirement for initiative petition circulators); *Morrill v. Weaver*, 224 F. Supp. 2d 882, 904 (E.D. Pa. 2002) (holding an in-district residency requirement unconstitutional but suggesting that a state residency requirement may be constitutional).

As the Sixth Circuit noted in *Nader v. Blackwell*, "sister circuits have heeded the Court's warning against litmus-paper tests, have carefully examined any challenged residency and registration requirements, and have divided as to their constitutionality." 2008 WL 4722584, at *15. The Court should resolve the residency requirement issue at this time.

C. The Ninth Circuit Erred in Applying Strict Scrutiny to Arizona's Residency Requirement Where the Burden Was Not Shown to Be Severe.

The Ninth Circuit reasoned that Arizona's residency requirement created a severe burden on Nader's speech and associational rights because there was a smaller pool of potential circulators as a result of the requirement. (App. A at 16a.) Thus, according to the court, the residency requirement would limit the size of the audience that could hear the proponents' message. (App. A at 15a.) Accordingly, the court applied strict scrutiny and held that, although the State had a compelling interest in preventing election fraud and ensuring the integrity of elections, the

residency requirement was not narrowly tailored to achieve that interest. (App. A at 18a-20a.)

The Ninth Circuit should not have applied strict scrutiny because there was no evidence that the residency requirement imposed a severe burden (or, indeed, *any* burden) on the rights of Nader or his supporters. *Buckley* does not require strict scrutiny of a requirement any time that requirement results in a smaller number of potential petition circulators, no matter how large the existing pool of circulators and no matter whether the restriction, in fact, severely burdens the challengers' ability to convey their message. Instead, review of a restriction such as the state residency requirement should include consideration of the extent of the available pool of circulators and the extent to which the requirement reasonably affects the challengers' ability to communicate their message or to gain access to the ballot.

Such an approach would be consistent with the Court's decisions in cases involving candidates' speech and association rights and those of their supporters. *See, e.g.*, *Timmons*, 520 U.S. at 358 (stating that the court weighs the character and magnitude of the burden imposed by the state regulation against the interests put forward by the state for the burden, and noting that lesser burdens are subject to less exacting scrutiny); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (same); *Anderson*, 460 U.S. at 789 (stating that only after weighing the character and magnitude of the asserted injury to the challenger's constitutional rights against the interests put

forward by the state as justifications for the law can a court decide whether the challenged law is constitutional); *cf. Buckley*, 525 U.S. at 192 ("We have several times said 'no litmus-paper test' will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon 'no substitute for the hard judgments that must be made.'") (*quoting Storer v. Brown*, 415 U.S. 724, 730 (1974)).

Although the *Buckley* Court applied strict scrutiny to Colorado's registration requirement, it did so after finding that many thousands of the state's residents would be prohibited from circulating petitions for initiatives within their state. The challengers in *Buckley* had offered evidence that "large numbers" of those who were willing to circulate initiative petitions in Colorado on behalf of the challengers were not registered to vote. *Buckley*, 525 U.S. at 194.

Unlike the law at issue in *Buckley*, Arizona's residency requirement permits every Arizona citizen, who is otherwise eligible to register to vote, to verify petition signatures. Nader never made any showing that the residency requirement restricted his ability to garner supporters willing to convey his message to the citizens of Arizona in support of his candidacy. Neither did he make any showing that the residency requirement hindered his ability to gain access to Arizona's ballot or to associate with his supporters. Indeed, Nader succeeded in making the 2008 Arizona ballot. Respondents did not even offer any evidence in the district court of a single individual who desired to

circulate petitions for Nader but who could not do so because of the residency requirement. Although Nader argued that he would be prohibited from circulating petitions for his own candidacy, he never offered any evidence that he or any other non-Arizona resident would do so but for the restriction. The Ninth Circuit's *per se* rule that any decrease in the number of potential circulators mandates the application of strict scrutiny is not required by *Buckley* and is not consistent with the Court's jurisprudence on review of state election regulation.

Even if strict scrutiny were the appropriate standard of review of this integrity-policing measure, the Ninth Circuit erred in concluding that the residency requirement did not withstand that review. The Ninth Circuit recognized Arizona's compelling interest in protecting the integrity of the petition circulating process to prevent fraud. (App. A at 18a); *accord Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S. Ct. 5, 7 (2006) ("'A State indisputably has a compelling interest in preserving the integrity of its election process.'") (*quoting Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989)). The Ninth Circuit erred, however, in holding that Arizona's residency requirement was not narrowly tailored to achieve the State's interest in preventing petition circulator fraud.

The State demonstrated that the residency requirement was necessary to ensure that individuals who verified petition signatures would be subject to the State's subpoena power in the event such

individuals were necessary to nomination challenge proceedings. The Ninth Circuit did not question that the residency requirement served the State's purpose. Instead, the Ninth Circuit speculated that the State could meet its purpose by requiring individuals who verify petition signatures to consent to jurisdiction in Arizona. (App. A at 18a-19a.) No evidence supports such conclusion, however. Arizona's nomination challenge proceedings take place within a very short time period after the nomination petition filing deadline. Without the ability to subpoena individuals to appear in the state court, within days of service of a subpoena, the State cannot ensure that such individuals will be compelled to appear and be examined regarding the validity of signatures or the circumstances of the verification of nomination petitions. There was no evidence that requiring out-of-state individuals to submit to jurisdiction in Arizona would have ensured that the State could locate and subpoena them and compel their appearance within days in an Arizona court proceeding.

The Ninth Circuit also noted that the State failed to "contend that its history of fraud was related to non-resident circulators, a history that might justify regulating non-residents differently from residents." (App. A at 20a.) The Ninth Circuit thus disregarded the evidence of petition circulation fraud in Arizona, because the record did not link such fraud to out-of-state circulators. (See dkt. 46, ex. 10.) The Ninth Circuit's approach, however, is contrary to the Court's decision in *Crawford v. Marion County Election*

Board, 128 S. Ct. 1610 (2008). In *Crawford*, the Court upheld Indiana's prophylactic measures to prevent in-person voter fraud at the polls, even though there was no evidence of any history of in-person voter fraud in Indiana. *Crawford*, 128 S. Ct. at 1613, 1618-19. Instead, the only evidence of historical voter fraud in Indiana existed in the context of absentee balloting. *Id.* at 1619. The Court nonetheless upheld Indiana's interest in enacting measures to prevent in-person fraud, rather than waiting for such fraud to occur or be detected. *Id.* at 1623-24. In light of the principles set out in *Crawford*, the court erred in requiring the State to prove specific instances of out-of-state circulator fraud.

II. The Filing Deadline.

A. The Ninth Circuit's Decision on the Constitutionality of Arizona's Candidate Filing Deadline Conflicts with the Decision of the Arizona Supreme Court on the Same Issue.

The Ninth Circuit's holding that Arizona's nomination petition deadline is unconstitutional directly conflicts with the holding of the Arizona Supreme Court in *Browne v. Bayless*, 46 P.3d 416 (Ariz.), *cert. denied*, 537 U.S. 1088 (2002). Although the Ninth Circuit did not distinguish or even mention *Browne*, that court addressed the constitutionality of, and upheld, Arizona's requirement that independent presidential candidates (as other candidates) file their

nomination petitions no fewer than ninety days before the primary election. *Browne*, 46 P.3d at 417.

Like the Ninth Circuit panel, the *Browne* court analyzed the constitutionality of Arizona's filing deadline under the principles and holding of *Anderson*. Contrary to the Ninth Circuit's holding and analysis, however, the *Browne* court held that strict scrutiny was not appropriate under *Anderson*'s reasoning because any burden imposed by the filing deadline on the rights of independent voters was not severe. *Id.* at 419. The *Browne* court's conclusion was based on the court's findings that the deadline in Arizona was significantly closer to the date for voting in the general election and that "the national political process has evolved toward a system of ever-earlier presidential primary elections," which results in an earlier determination of the identities and positions of the major party candidates. *Id.* Thus, the court determined that, under Arizona's filing deadline, independent voters would have sufficient time to coalesce around a viable independent candidate. *Id.*

Because the filing deadline did not severely burden the rights of independent voters, the court held, the requirement was constitutional if it was reasonable and nondiscriminatory. *Id.* at 420. The court held that the filing deadline requirement met that standard and was rationally related to the State's important regulatory interests in conducting fair and orderly elections. *Id.* The filing deadline served those interests by affording sufficient time to prepare and print early ballots, distribute overseas

ballots, translate ballots into other languages, and complete judicial review of election challenges. *See id.* at 419-20.

B. The Ninth Circuit Erred in Deciding that Arizona's Filing Deadline Is Subject to Strict Scrutiny.

The Ninth Circuit based its determination that the filing deadline imposed a severe burden on Nader, which in turn triggered strict scrutiny, on two grounds. First, the court found that *Anderson* mandated a finding of a severe burden. Second, the court believed that Arizona's historical experience, in which no independent presidential candidates have been on the State's ballot since 1993, "suggests that the regulations impose a severe burden that has impeded ballot access." (App. A at 22a.) Neither of those grounds is supported by *Anderson*.

Anderson involved a challenge to Ohio's independent candidate filing deadline, which in 1980 fell on March 20th – 229 days before the general election. *Anderson*, 460 U.S. at 783 n.1. The Court did not purport to apply strict scrutiny to the filing deadline at issue in *Anderson*. Instead, the Court first "consider[ed] the character and magnitude of the asserted injury" to First and Fourteenth Amendment rights, and then evaluated "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* at 789. There was no dispute that Ohio's filing deadline burdened Anderson's ability to

be a candidate because the filing deadline predated his announcement of his candidacy and he obtained and submitted the requisite number of signatures after the filing deadline. *Id.* at 782.[3]

The Court recognized that "'as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Id.* at 788 (*quoting Storer*, 415 U.S. at 730). The Court stated that "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Id.* Although the *Anderson* Court struck down Ohio's filing deadline, it did so only after weighing the burden on Anderson and his supporters against the state interests put forward as justifications for the filing deadline. *Id.* at 796-806.

The Ninth Circuit began its analysis by noting that the *Anderson* Court "concluded that none of the state's asserted interests justified the 'extent and nature' of the burden imposed by the March filing deadline." (App. A at 21a.) From that accurate, but unremarkable, observation, the Ninth Circuit concluded that Arizona's filing deadline necessarily

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[3] This Court has consistently required challengers to bear the burden of showing that the restriction at issue burdens them. *See, e.g.*, *Crawford*, 128 S. Ct. at 1623 ("[O]n the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes 'excessively burdensome requirements' on any class of voters.").

imposed a severe burden because "*Anderson* remains binding Supreme Court authority." (App. A at 22a.) But the Ninth Circuit did not undertake to do what *Anderson* requires – to weigh the nature and magnitude of the injury caused by the challenged restriction against the interests put forward by the State – before concluding that there was a severe burden imposed on Nader's rights. Instead, the court began with the notion that the ultimate outcome in *Anderson* required a finding of a severe burden and the application of strict scrutiny. Based on that faulty premise, the court believed that unless the State could demonstrate the need for precisely 113 days between the candidate filing deadline and the start of early voting in the general election, such a requirement could not be constitutional.

Unlike the filing deadline struck down in *Anderson*, which fell twice as many days before voting in the general election as Arizona's filing deadline in 2004, Arizona's deadline is necessary to accommodate the State's interests in conducting fair and efficient elections. Those interests include allowing sufficient time for the candidate nomination challenge process and the translating, printing and distributing of the ballots in accordance with state law requirements for early voting. In contrast, the *Anderson* Court specifically noted that "Ohio [did] not suggest that the March deadline [was] necessary to allow petition signatures to be counted and verified or to permit November general election ballots to be printed." *Anderson*, 460 U.S. at 800. In this case, the State

supported its interests with evidence – which was unrebutted before the district court – establishing the need for its June filing deadline.

And unlike Anderson's demonstration that Ohio's deadline burdened his ability to be a candidate, neither Nader nor his supporters made a showing of any burden, severe or otherwise, that was imposed on their First Amendment freedoms by Arizona's filing deadline. The district court found, and the Ninth Circuit did not disagree, that the filing deadline was not the reason for Nader's failure to get on the ballot. Instead, despite having announced his candidacy for President in February 2004, his campaign did not attempt to collect any signatures until April 2004 and, in fact, waited until two weeks before the deadline to collect the vast majority of those signatures. (App. B at 12b-13b.) Nader voluntarily withdrew his petitions based on his assertion that he had not collected a sufficient number of valid signatures. (*Id.* at 2b.)

Thus, in holding that the filing deadline as applied to independent presidential candidates imposed a "severe burden" on Nader's rights, the Ninth Circuit implicitly ruled that no showing of any actual burden on the challenger was necessary. Because such a holding contradicts the principles set out in *Anderson* and its progeny, the Court should grant certiorari to resolve the conflict created by the Ninth Circuit's decision.

CONCLUSION

The Court should grant this petition for certiorari.

Respectfully submitted,

TERRY GODDARD
Attorney General of Arizona
MARY R. O'GRADY*
Solicitor General
BARBARA A. BAILEY, *of counsel*
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007-2926
(602) 542-3333

**Counsel of Record* *Counsel for Petitioner*

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RALPH NADER; DONALD N. DAIEN, *Plaintiffs-Appellants*, v. JANICE BREWER, in her official capacity as Secretary of State of Arizona, *Defendant-Appellee.*	No. 06-16251 D.C. No. CV-04-01699-FJM OPINION

Appeal from the United States District Court
for the District of Arizona
Frederick J. Martone, District Judge, Presiding

Argued and Submitted
April 15, 2008 – San Francisco, California

Filed July 9, 2008

Before: Mary M. Schroeder, Richard R. Clifton, and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Schroeder

COUNSEL

Robert E. Barnes, Milwaukee, Wisconsin, for plaintiffs-appellants Ralph Nader, et al.

Barbara A. Bailey, Phoenix, Arizona, for defendant-appellee Janice Brewer, et al.

OPINION

SCHROEDER, Circuit Judge,

Introduction

Ralph Nader and one of his supporters in Arizona, Donald Daien (collectively, "plaintiffs"), appeal from the district court's grant of summary judgment to Janice Brewer, the Secretary of State of Arizona. Plaintiffs alleged that two provisions of Arizona's statutory election scheme – the requirement that circulators of nomination petitions be residents of Arizona and the requirement that nomination petitions be filed at least 90 days before the primary election – violated their rights to political speech and association under the First and Fourteenth Amendments. The case arose from Nader's efforts to appear on the 2004 Arizona general – election ballot as a presidential candidate. The district court upheld both petition requirements, holding that the burdens imposed on the exercise of plaintiffs' rights were not significant and were sufficiently justified by the state's interests.

The district court measured the burdens in terms of the effect the requirements had on Nader's ability to get on the Arizona ballot. The court held that these requirements were not a material cause of Nader's

failure to get on the ballot in 2004 and the burdens were therefore minimal.

In this appeal Nader stresses that the burdens of the residency requirement should be measured in terms of the effect the requirement has on the rights of persons like himself who live outside Arizona and wish to circulate petitions in that state. Controlling Supreme Court authority and a persuasive opinion of the Seventh Circuit support Nader's position. *See Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999); *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000). Controlling Supreme Court authority also requires us to hold that the burdens imposed by Arizona's early filing requirement are severe and must be supported by compelling interests. *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

Neither the district court nor this court has had the benefit of much documentation of the state's needs for the requirements. We conclude, on the basis of this record, when examined after the passage of the considerable amount of time expended completing the appellate process, that the burdens are significant and that the state has not shown the requirements are sufficiently narrowly tailored to further compelling interests.

I. Background

Ralph Nader, a resident of Connecticut, announced his independent candidacy for President of the United States on February 22, 2004. Donald

Daien is one of Nader's supporters and is a registered voter in Arizona who wanted to vote for Nader and to serve as a presidential elector on Nader's behalf. Nader and Daien, along with other supporters, brought this action in August 2004 against Secretary of State Brewer, alleging that the residency requirement and the early filing deadline severely burdened the rights of expressive association and political speech of political candidates, potential petition circulators, and voters, in violation of the First and Fourteenth Amendments. They sought declaratory and injunctive relief.

A. Arizona's Nomination-Petition System

In Arizona, a person who is not a member of a recognized political party may gain a place on the ballot by filing nomination petitions containing a prescribed number of signatures. Ariz. Rev. Stat. § 16-341(C), (E), (F), (I). The petitions are filed for the office of presidential elector rather than for the presidential candidate; the petitions designate the presidential candidate and the names of ten individuals who would serve as electors for that candidate. *Id.* § 16-341(G), (H).

The same statute establishes the total number of signatures required for each political office, which is 3% of the registered voters in the political subdivision for which the candidate is nominated, who are not members of recognized political parties. *Id.* § 16-341(E), (F). Each signature must be witnessed by the

petition circulator. *Id.* § 16-321(D). In 2004, the number of signatures required for the office of presidential elector in Arizona was 14,694.

Only persons qualified to register to vote in Arizona can circulate petitions. *Id.* §§ 16-101, 16-321(D). In order to be qualified to register to vote, a person must, among other things, be a resident of Arizona and must have been a resident at least twenty-nine days before the election ("the residency requirement"). *Id.* § 16-101(A)(3). Under this statutory limitation, all non-residents of Arizona, including Nader himself, are prohibited from circulating petitions in support of Nader's candidacy.

Nomination petitions must be filed with the Secretary of State's office no later than 90 days before the primary election ("the filing deadline"). *Id.* §§ 16-311(A), (E), 16-341(C). This places the filing deadline 146 days before the general election. In 2004, the general election was held on November 2, the primary election was held on September 7, and the filing deadline was June 9.

An Arizona registered voter may challenge the validity of a candidate's petitions by bringing an action in superior court. *Id.* § 16-351. Such action must be brought within ten business days of the filing deadline, and the superior court must hear and decide the action within ten calendar days of its filing. *Id.* § 16-351(A). The decision is appealable only to the Arizona Supreme Court, and it must be

appealed within 5 calendar days. *Id.* The Supreme Court must decide the appeal promptly. *Id.*

At least 45 days before the general election, the state must prepare a proof of a sample ballot. *Id.* § 16-461(A). According to the state's affidavits, the state also mails ballots to overseas members of the military 45 days before the general election. Voters can cast early ballots beginning 33 days before the general election; in 2004, early voting began on September 30.

As we construe the data provided by the state, the timeline for the 2004 election was as follows:

Presidential Preference Election	February 3
Filing Deadline for Nader	June 9
Primary Election	September 7
Deadline to Prepare Proof of Sample Ballot	September 18
First Day of Early Voting	September 30
General Election	November 2

B. Proceedings Below

Nader filed his Arizona presidential nomination petitions with the Secretary of State on June 9, 2004. Two Arizona voters then filed an action on June 23 in the Superior Court in Maricopa County, challenging his eligibility. They alleged that his petitions did not provide the required number of valid signatures, that the petitions included signatures forged by

circulators, that some petitions had been circulated by felons, and that the petitions contained falsified addresses of circulators. Nader conceded that the petitions did not meet the signature requirements and on July 2, 2004, withdrew his candidacy for the Arizona ballot.

In August 2004, plaintiffs brought this action for declaratory and injunctive relief, alleging that the residency requirement and the early filing deadline severely burdened the rights of expressive association and political speech of political candidates, potential circulators, and voters, in violation of the First and Fourteenth Amendments, and that neither regulation could survive strict scrutiny. They sought a declaration that Arizona's statutory election scheme was unconstitutional as applied to them and an injunction barring the enforcement of the statutory deadlines in the 2004 election. The district court denied plaintiffs' motion for preliminary injunctive relief.

Both sides moved for summary judgment in January of 2006. The state argued that the restrictions did not impose a severe burden on plaintiffs' rights. It argued further that even if the burden imposed was severe, both the residency and filing deadline requirements should survive strict scrutiny. The state urged that the residency requirement was narrowly tailored to further the state's interest in preventing fraud in the election process, in order to ensure that circulators could be located and subpoenaed in time for petition challenges. With respect to the filing deadline, the state contended that it was

narrowly tailored to further the state's administrative and statutory obligations, given the deadlines related to early voting and sample ballots and the state's schedule for printing the ballots.

In support of its 2006 summary judgment motion, the state submitted affidavits from Joseph Kanefield, the State Election Director, and Karen Osborne, the Director of Elections for Maricopa County, describing the planned schedule for the 2008 election. Osborne explained the procedures that would be utilized for the optical-scan ballots used in Maricopa and Pima Counties, which together represent almost 76% of the state's registered voters. According to Osborne, Maricopa County planned to begin the layout of its general-election ballot as soon as the June 11 filing deadline passed. The first candidates listed on the ballots would be those for the office of presidential elector. The layout of the remainder of the ballot thus depended on the number of candidates for that office. The judges and state initiatives, as well as the county, city, and school ballot propositions, were to be listed on the back of the ballot.

Maricopa County's plan was to print its 2008 ballots in two stages. It would send the back side of the ballot for printing on August 20. The printing of the front side would begin on September 16, after the candidates for the offices listed on the front side were determined in the primary election. The county would receive the completed ballots from the printer no later than September 24, to allow time for testing and

inspecting the ballots, distribution to early voting sites, and mailing for early voting, to begin October 2. The affidavit stated that ballots undergo "Logic" and "Accuracy" tests in each precinct in October.

The only explanation for why the names of the presidential candidates for the general election had to be known in June, three months before the primary, was that the ballot paper had to be ordered about five months before the election. According to the election officials' affidavits, the paper for the ballots would be ordered in late May or early June to ensure availability. The state's motion asserted that if it were to find out later than June that ten presidential electors needed to be added to the ballot, the ballot would require two pages instead of one, and, as a result, Maricopa County would be unable to acquire the additional paper or print the ballots in time. According to the affidavits, however, there are a total of more than 400 state and local offices and dozens of other ballot measures on the general-election ballot. So far as this record indicates, the candidates for all offices, from presidential electors to local officials, are on the same ballot. The state did not explain with any specificity how many offices and measures would appear on a ballot in any given precinct. Nor did the state explain when the nature and number of initiative measures, school bond measures, and other types of ballot measures, which may vary in number and size, need to be known.

The state's affidavits did not fully deal with Arizona's history of moving the filing deadline back.

The state legislature in 1993 moved the filing deadline from a date 10 days after the primary election to a date 75 days before the primary election. *See* Act of Apr. 14, 1993, 1993 Ariz. Sess. Laws ch. 98, sec. 24, § 16-341(C). The legislature in 1999 again moved back the deadline, this time to 90 days before the primary election. *See* Act of May 13, 1999, 1999 Ariz. Sess. Laws ch. 224, sec. 1, § 16-311(A). The record indicates that the 1999 change was made to allow more time for petition challenges, but there is no information in the record about the reasons the deadline was moved in 1993.

Kanefield's affidavit dealt with the history of ballot access by candidates. It declared that since 1994, eight candidates for the state legislature, one candidate for U.S. Representative in Congress, one candidate for the U.S. Senate, and one candidate for governor of the state of Arizona have gained access to the general-election ballot using the procedure provided by section 16-341. Of these offices, only two are voted on statewide. Since the filing deadline was moved in 1993, no independent presidential candidate has achieved a place on Arizona's ballot.

The state also submitted evidence of five criminal prosecutions that the state has pursued for petition fraud. The state did not assert that any of the prosecutions had to do with non-resident circulators.

The district court in June 2006 granted the state's motion for summary judgment and denied plaintiffs' motion for summary judgment. The district

court rejected the state's threshold position that plaintiffs' challenge to the requirements as they applied to the 2004 election was moot, applying the exception to the mootness doctrine for problems "capable of repetition, yet evading review." *See Moore v. Ogilvie,* 394 U.S. 814, 816 (1969) (internal quotation marks omitted) (quoting *S. Pac. Terminal Co. v. Interstate Commerce Comm'n,* 219 U.S. 498, 515 (1911)). The state does not challenge this conclusion on appeal.

With respect to the merits of plaintiffs' claims, the district court viewed the burden on plaintiffs' rights as minimal. It reasoned that even with the residency requirement for petition circulators, there were still several million Arizona residents eligible to vote and hence to circulate petitions. Regarding the filing deadline, the district court observed that states now hold their presidential primaries much earlier in the election year than they did when the Supreme Court held in *Anderson,* 460 U.S. at 806, that an early filing deadline impermissibly burdened independent voters' access to candidates of their choice. The district court reasoned that the Supreme Court's concern about maintaining the ability of an independent to announce a candidacy as a response to developments in major-party candidates' campaigns was less valid than it was when *Anderson* was decided. The district court concluded that the filing deadline provided a "reasonably diligent" candidate enough time to gather the required number of signatures under the standard this court utilized in

Libertarian Party of Washington v. Munro, 31 F.3d 759, 762 (9th Cir. 1994).

The district court ruled both restrictions constitutional, holding that any burden imposed on plaintiffs' rights by the residency requirement was justified by the state's compelling interest in protecting the integrity of the election process, and any burden imposed by the filing deadline was justified by the state's compelling interest in allowing sufficient time to verify signatures, permit challenges to petitions, and print and distribute ballots. Because the court did not find that a severe burden was imposed by the restrictions, it did not hold the state to the heightened requirement of proving the restrictions were narrowly tailored to serve compelling state interests.

On appeal, plaintiffs argue that the court should have applied strict scrutiny to both restrictions because each severely burdens plaintiffs' rights, and that under strict scrutiny, neither is narrowly tailored to further a compelling state interest.

II. Analysis

[1] The Supreme Court has held that when an election law is challenged, its validity depends on the severity of the burden it imposes on the exercise of constitutional rights and the strength of the state interests it serves. In the seminal case of *Anderson,* 460 U.S. at 789, the Court held that, in considering a constitutional challenge to an election law, a court

must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" against "the precise interests put forward by the State as justifications for the burden imposed by its rule." The Court struck down Ohio's March filing deadline for independent presidential candidates because the state's "minimal" interests did not justify the "extent and nature" of the burdens imposed by the deadline. *Id.* at 806.

[2] The Court clarified the standard in *Burdick v. Takushi,* 504 U.S. 428, 434 (1992), when it held that the severity of the burden the election law imposes on the plaintiff's rights dictates the level of scrutiny applied by the court. In *Burdick,* the Court upheld a prohibition on write-in voting in Hawaii, holding that the limited burden imposed was justified by Hawaii's interests in preventing factionalism and the manipulation of parties' primary elections through write-in campaigns. *Id.* at 438-40, 441-42. The Court held that an election regulation that imposes a severe burden is subject to strict scrutiny and will be upheld only if it is narrowly tailored to serve a compelling state interest. *See id.* at 434. It held that a state's "important regulatory interests" are usually sufficient to justify election regulations that impose lesser burdens. *Id.* The Court recently reaffirmed these principles in *Washington State Grange v. Washington State Republican Party,* ___ U.S. ___, 128 S. Ct. 1184, 1191-92 (2008).

[3] The leading case in our circuit is *Libertarian Party,* where we upheld the state of Washington's

filing deadline for minor-party candidates that was only weeks before the deadline established for major-party candidates. 31 F.3d at 762, 765. We held that the burden on plaintiffs' rights should be measured by whether, in light of the entire statutory scheme regulating ballot access, "reasonably diligent" candidates can normally gain a place on the ballot, or whether they will rarely succeed in doing so. *Id.* at 761-62 (internal quotation marks omitted) (quoting *Storer v. Brown,* 415 U.S. 724, 742 (1974)). To determine the severity of the burden, we said that past candidates' ability to secure a place on the ballot can inform the court's analysis. *See id.* at 763.

With that legal background, we turn to each of the challenged Arizona election restrictions.

A. Residency Requirement for Petition Circulators

The first provision at issue here is the requirement that petition circulators be residents of the state. Petition circulators must be "qualified to register to vote in [Arizona]." Ariz. Rev. Stat. § 16-321(D). The provision enumerating the requirements for voter registration in turn provides, in relevant part: "Every resident of the state is qualified to register to vote if he . . . [w]ill have been a resident of the state twenty-nine days next preceding the election,. . . ." *Id.* § 16-101(A)(3).

[4] Plaintiffs contend that such a residency requirement unconstitutionally burdens their rights

to speech and association because it interferes with substantially more core political speech than is necessary. The leading decision on qualifications for petition circulators is *Buckley,* 525 U.S. 182, which involved a challenge to Colorado's regulation of initiative-petition circulators. One of the restrictions considered in that case was a requirement that circulators actually be registered to vote in the state. *Id.* at 186. The Court first stated, as it had done in *Meyer v. Grant,* that "[p]etition circulation . . . is 'core political speech,' because it involves 'interactive communication concerning political change,'" and that First Amendment protection for such interaction is therefore "'at its zenith.'" *Id.* at 186-87 (quoting *Meyer v. Grant,* 486 U.S. 414, 422, 425 (1988)). The Court then determined that the registration requirement imposed a severe burden on the speech rights of individuals involved with the initiative process because it significantly decreased the pool of potential circulators, which in turn limited the size of the audience that could hear the initiative proponents' message. *See id.* at 192 & n.12, 193-96.

[5] The state attempted to justify the burden as necessary to ensure circulators were subject to the state's subpoena power, but the Court found that the state's separate residency requirement achieved the same end, and agreed with the Tenth Circuit's statement that it did so "more precisely." *Id.* at 196-97. The Court expressly did not decide the validity of the separate residency requirement because it was not challenged in that case. *See id.* at 197. (Arizona's

residency provision appears similar to the residency requirement described in *Buckley* and is, of course, less restrictive than the provision invalidated in *Buckley* because the Arizona provision does not require circulators to be actual registered voters. While the district court correctly observed that there remain millions of potential Arizona circulators, the residency requirement nevertheless excludes from eligibility all persons who support the candidate but who, like Nader himself, live outside the state of Arizona. Such a restriction creates a severe burden on Nader and his out-of-state supporters' speech, voting and associational rights. Because the restriction creates a severe burden on plaintiffs' First Amendment rights, strict scrutiny applies. This is a conclusion we believe to be mandated by the Supreme Court in *Buckley*. The Court held in *Buckley* that significantly reducing the number of potential circulators imposed a severe burden on rights of political expression. *See id.* at 194-95.

This conclusion is also supported by two more recent circuit decisions. In *Chandler v. City of Arvada,* the Tenth Circuit held that a city ordinance requiring petition circulators to be residents imposed a severe burden on the speech rights of initiative proponents. 292 F.3d 1236, 1238-39, 1241-42 (10th Cir. 2002). It applied strict scrutiny. The court stated that "[s]trict scrutiny is applicable where the government restricts the overall quantum of speech available to the election or voting process. . . ." *Id.* at 1241-42 (internal quotation marks and citation

omitted). The court specifically ruled that strict scrutiny must be applied when the rights of potential petition circulators are restricted. Quoting from an earlier Tenth Circuit decision, it said that strict scrutiny must be "'employed where the quantum of speech is limited due to restrictions on . . . the available pool of circulators or other supporters of a candidate or initiative, as in [*Buckley*] and *Meyer*.'" *Id.* (quoting *Campbell v. Buckley,* 203 F.3d 738, 745 (10th Cir. 2000)).

In *Krislov,* the Seventh Circuit held that an in-district residency requirement, which operated as an in-state residency requirement for a candidate for the U.S. Senate, severely burdened candidates' rights to association and ballot access. 226 F.3d at 855-56, 857, 860-62. The court explained,

> What is particularly important in this case [in assessing the severity of the burden] . . . is the number of people the . . . requirements exclude from gathering signatures and thus disseminating the candidates' political message. . . . [The residency requirement] places a substantial burden on the candidates' First Amendment rights by making it more difficult for the candidates to disseminate their political views, to choose the most effective means of conveying their message, to associate in a meaningful way with the prospective solicitors for the purposes of eliciting political change, to gain access to the ballot, and to utilize the endorsement of their candidacies which can be implicit in a solicitor's

> efforts to gather signatures on the candidates' behalf.

Id. at 860, 862 (citing *Buckley,* 525 U.S. at 193 n. 15).

A brief Eighth Circuit opinion came to the opposite conclusion and upheld a residency requirement for initiative-petition circulators. *See Initiative & Referendum Institute v. Jaeger,* 241 F.3d 614, 617 (8th Cir. 2001). *Krislov* had been decided a few months earlier, but *Jaeger* did not cite it. The Tenth Circuit in *Chandler* did cite *Jaeger* and disagreed with it. *See Chandler,* 292 F.3d at 1244. We do not find *Jaeger* persuasive.

[6] The state contends here that if the standard is strict scrutiny, then the restriction is justified by the state's compelling interest in preventing fraud in the election process. It points to the evidence it presented of past election fraud in Arizona. A state's interest in ensuring the integrity of the election process and preventing fraud is compelling. *See Purcell v. Gonzalez,* 549 U.S. 1, 4 (2006) (per curiam). We therefore agree with Arizona that the state's interest in preventing election fraud is a compelling one. The state, however, bears the burden of proving that a regulation is narrowly tailored. *See ACLU of Nev. v. Heller,* 378 F.3d 979, 997 (9th Cir. 2004).

The state contends that this restriction is narrowly tailored to ensure that circulators are subject to the state's subpoena power, and that the state can locate them within the ten-day period allotted for petition challenges. Plaintiffs argue that requiring

circulators to submit to jurisdiction by agreement would achieve the same end and would be more narrowly tailored to further the state's interest in preventing fraud.

[7] Federal courts have generally looked with favor on requiring petition circulators to agree to submit to jurisdiction for purposes of subpoena enforcement, and the courts have viewed such a system to be a more narrowly tailored means than a residency requirement to achieve the same result. *See Chandler,* 292 F.3d at 1242-44 (holding that city residency requirement was "substantially broader than necessary" to ensure the integrity of the petition process in part because the city could instead require circulators to submit to jurisdiction of the city for subpoena enforcement); *Krislov,* 226 F.3d at 866 n. 7 (invalidating residency requirement and suggesting agreement to submit to jurisdiction as permissible restriction to further state's interest in preventing fraud); *Frami,* 255 F. Supp. 2d at 970 (noting that requiring petition circulators to agree to submit to jurisdiction for subpoena enforcement was a "less onerous method[]" than a residency requirement for serving the state's interest in ensuring circulators were subject to the state's jurisdiction). *Cf. Kean v. Clark,* 56 F. Supp. 2d 719, 733 (S.D. Miss. 1999) (holding that a residency requirement was narrowly tailored, but without considering any "consent to jurisdiction" alternative).

[8] The state responds that petition circulators could conceivably be spread throughout the country,

and that given the narrow timeframe for petition challenges in Arizona, such a "consent to jurisdiction" system would be unworkable. The state does not provide any evidence, however, to support this contention, observing only that professional petition circulators can be "nomadic." Nor did the state ever contend that its history of fraud was related to non-resident circulators, a history that might justify regulating non-residents differently from residents. *See Krislov,* 226 F.3d at 866 n. 7 ("[I]f the use of non-citizens were shown to correlate with a high incidence of fraud, a State might have a compelling interest in further regulating noncitizen circulators."); *Frami,* 255 F. Supp. 2d at 970 (holding a residency requirement was not narrowly tailored to serve the state's interest in preventing fraud because defendant had "not even alleged that the state has experienced problems in the past with non-resident petition circulators or that such circulators are more likely to engage in fraud than in-state . . . circulators.").

[9] We conclude that the state did not meet its burden of showing that this residency requirement is narrowly tailored to further the state's compelling interest in preventing fraud. On the basis of the record before us, the requirement cannot be sustained.

B. Filing Deadline

The second provision at issue is the requirement that petitions be filed 90 days before the primary

election. Plaintiffs argue that this deadline imposes a severe burden on their speech, association and voting rights and that the state has not shown that the deadline is narrowly tailored to further a compelling interest.

[10] In *Anderson*, the Supreme Court struck down Ohio's March filing deadline for an independent presidential candidate's nomination petition. 460 U.S. at 806. In evaluating the severity of the burden imposed, the Court observed that the deadline deprived independent candidates of their ability to respond to developments in the course of the campaigns of the major-party candidates. *See id.* at 791-92, 791 n. 12. The Court observed that particular independent candidacies, and voter support for those candidacies, sometimes occur as a reaction to the particular nominees of the major parties. *See id.* It also found that collecting 5,000 signatures far in advance of the general election was difficult, since interest levels were low and volunteers were difficult to recruit. *See id.* at 792. The Court concluded that none of the state's asserted interests justified the "extent and nature" of the burden imposed by the March filing deadline. *Id.* at 806.

In this case, the district court concluded that *Anderson* was not controlling. The court reasoned that Arizona's 2004 presidential preference election was held well in advance of the filing deadline, that the major parties' candidates and platforms were well-known, and the level of public interest was high by then. The district court dismissed the significance

of the concerns in *Anderson* because they were not present in the 2004 election.

The 2004 election, however, may not have been representative of future elections, where the major party candidates may not be determined so far in advance of the filing deadline. *Anderson* remains binding Supreme Court authority. We conclude that the concerns expressed in *Anderson* may well remain significant, and in any event, we are not free to disregard them.

[11] The historical evidence of ballot access in Arizona further supports this conclusion. *See Libertarian Party,* 31 F.3d at 763 (looking to historical experience to support conclusion that ballot-access scheme did not severely burden minor-party candidates' rights). Since 1993, when Arizona changed its filing deadline from 10 days after the primary election to 75 days before the primary election, no independent presidential candidate has appeared on Arizona's ballot. This experience suggests that the regulations impose a severe burden that has impeded ballot access.

The state tries to maintain that this record supports the early deadline for presidential candidates, because independent candidates for other offices have gained ballot access. Yet candidates for president are national candidates and thus situated differently from candidates for state offices, or even other federal offices in Arizona; presidential candidates in Arizona are required to file more signatures

than candidates for local offices. Evidence regarding independent candidacies for other offices is not particularly persuasive and certainly not conclusive in this case.

The state relies upon *Libertarian Party*. There we upheld a Washington statute requiring minor-party candidates to obtain 200 signatures for statewide offices or 25 signatures for other offices by July 4 of the election year. *Libertarian Party,* 31 F.3d at 760-61. The case thus involved a comparatively small number of signatures and a date closer to the major parties' conventions. For those reasons we concluded that only a de minimis burden was imposed. *See id.* at 763. We explained why the restrictions were much less burdensome than those in *Anderson*. *See id.* at 762. We pointed out that collecting such a small number of signatures just four to five weeks before the selection of major-party candidates was not particularly difficult. *See id.* We also deemed it significant that the plaintiffs challenging the regulation had all been able to announce and file on time, and that they could not identify any candidates who had been denied ballot access because of Washington's procedures. *Id.* at 763.

In *Anderson,* by contrast, where the plaintiff was forced to file petitions in March, five months before the major-party candidates were to be decided, 460 U.S. at 790-91, and had been unable to get his name on the ballot, *id.* at 782-83, the early filing deadline was struck down, *id.* at 806. Nader's predicament is like that of the plaintiff in *Anderson*. Here, the

signature requirement is greater and the deadline tighter than in *Libertarian Party.* Unlike the candidates in *Libertarian Party,* independent presidential candidates in Arizona have not been able to get on the ballot. The Sixth Circuit's opinion in *Libertarian Party of Ohio v. Blackwell,* 462 F.3d 579, 590-91 (6th Cir. 2006), contains a good discussion of the various circuit court decisions in cases considering and striking down early filing deadlines in state elections.

[12] For these reasons we must conclude that the Arizona deadline imposes a severe burden on plaintiffs' rights. Because a severe burden is imposed, strict scrutiny applies to the filing deadline as well. *See Anderson,* 460 U.S. at 792, 795, 806.

[13] The state next contends that even under strict scrutiny, the filing deadline is constitutional because it is necessary in order for the state to meet its various deadlines for petition challenges, sample ballots, early voting ballots and overseas military personnel, as well as for the layout and printing of ballots.

[14] When we examine the timeline, however, together with the relatively small impact of the presidential election on the overall length of Arizona's general-election ballots, we cannot say that the state has justified the early filing deadline. The state asserts that Arizona's general election ballots include over 400 different federal, state, and local elected offices and dozens of local ballot measures. The state contends in effect that it can accommodate all the

other offices and initiatives, but not the addition of ten electors for the office of President. This does not appear on its face to be an internally consistent position. The state has not explained when and how it learns of the number of other offices and initiatives that must be placed on the general-election ballot. Presumably, the results of the September primary election would have some effect on the length of the general-election ballot as well, but the state has not documented the process in sufficient detail to determine what effect it would or would not have. The state made the conclusory assertion that it must order the ballot paper by early June to ensure availability, but it has not provided documentation or any other evidence supporting this conclusion.

[15] There is thus no satisfactory explanation in the record as to why the state needs the full amount of time between the filing deadline for independent candidates, which in 2004 fell on June 9, and its first statutory deadline of printing a sample ballot 45 days before the general election, which in 2004 fell on September 18, to prepare the ballots for the general election. In light of the state's ability to put together the general-election ballot after the primary in September, and its failure adequately to demonstrate why the petition filing deadline must be so early, the state has on this record failed to show that the deadline is narrowly tailored to further compelling administrative needs.

Conclusion

Election cases are difficult. The historical background for such litigation changes rapidly. The district court was faced with a serious challenge to ballot-access requirements that have proved difficult for courts to evaluate, given both the state's compelling interests in preventing fraud and providing orderly election administration, and the Constitution's mandate for free political expression and participation that require such ballot-access restrictions to survive strict judicial scrutiny. Although the district court did not agree with plaintiffs that the requirements constituted serious impediments to the exercise of their constitutional rights, we conclude that the burdens are serious and the restrictions are not sufficiently narrowly tailored to serve the state's compelling interests. The state was given every opportunity to meet the heavy burden that the district court or a higher court might eventually determine that it must shoulder under strict scrutiny. On the basis of the record before us, the state did not do so.

The judgment of the district court is **REVERSED** and **REMANDED** with instructions to enter summary judgment in favor of plaintiffs.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Ralph Nader, et al., Plaintiffs, vs. Janice Brewer, in her official capacity of Secretary of State, Defendant.	No. CV-04-1699-PHX-FJM **ORDER**

The court has before it defendant's Motion for Summary Judgment (doc. 45), plaintiffs' Motion for Summary Judgment (doc. 47) and Memorandum (doc. 56), defendant's Response (doc. 49) and Reply (doc. 55), and plaintiffs' Response and Reply (doc. 51).

I

Ralph Nader, an independent candidate for President in 2004, and Donald Daien, a registered Arizona voter who supported Nader, brought this action alleging that Arizona's ballot access statutes deprive them of their First and Fourteenth Amendment rights to free speech and association. Nader announced his candidacy on February 22, 2004. On June 9, 2004, he filed nomination petitions with the Secretary of State of Arizona, containing approximately 21,185 signatures. Thereafter, two voters filed

an action in the Superior Court of Arizona in Maricopa County, challenging Nader's eligibility for the ballot on the basis that Nader failed to file a sufficient number of valid signatures, Nader's petitions included forgeries by circulators, some of Nader's petitions were circulated by felons, and certain circulators falsified their addresses. At the time set for trial, Nader advised the court that he was withdrawing his petitions and his candidacy in Arizona because he failed to collect enough valid signatures. Based on Nader's statement, the superior court entered judgment enjoining the Secretary of State and county election officials from placing Nader and his electors on the ballot.

Plaintiffs then brought this action challenging Arizona's election statutes as unconstitutional. We denied plaintiffs' application for preliminary injunctive relief and the election was held without Nader. Plaintiffs now seek declaratory relief that Arizona election laws are unconstitutional to the extent that they (1) require those who circulate nomination petitions on behalf of presidential candidates to be qualified to vote in Arizona, and (2) impose an early deadline for filing nomination petitions far in advance of either party's national convention.[1]

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[1] Our resolution of these issues is made on a very limited record. Plaintiffs did not file a statement of facts, but instead chose to rely on the State's submission. Plaintiffs offered no evidence to establish the significance of the burden imposed on them by the challenged statutes.

Independent candidates for public office may get on the ballot in Arizona by filing nomination petitions containing a requisite number of signatures. A.R.S. § 16-341. In a national presidential election, the petitions are filed for the office of presidential elector, rather than for the candidate. *Id.* at § 16-341(G). The number of signatures required for an independent presidential candidate to get on the ballot is 3% of registered voters who are not registered as members of a recognized political party. A.R.S. § 16-341(E). In 2004, 14,694 signatures were required. Nomination papers for all candidates for presidential elector, whether they represent a candidate from a recognized party or an independent candidate, are due no fewer than 90 days before the primary election. A.R.S. §§ 16-311(A), 16-341(C). In 2004, the filing deadline was June 9, 2004. Arizona law also provides that any person who is "qualified to register to vote" in Arizona may circulate nomination petitions. A.R.S. §§ 16-315(B), 16-321(D).

II

A

Defendant contends that we should dismiss for lack of standing and mootness. Parties seeking to invoke the jurisdiction of federal courts must show that they have standing to sue within the meaning of Article III. Standing has essentially three components: a plaintiff must show that he has suffered an "injury in fact," that the challenged action caused the

injury, and that the injury can likely be redressed by the cause of action. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992). Nader contends that his First Amendment rights to free speech and free association are violated by A.R.S. §§ 16-315(B) and 16-321(D), which prohibit him from circulating petitions in Arizona because he is not an Arizona resident. Plaintiffs contend that their vote, and their associational and speech rights, are diminished by the limits imposed on ballot choices caused by early filing deadlines. Because the "injury in fact," causation, and redressibility components were satisfied, plaintiffs had standing to bring this action.

Although the election was held without Nader's name on the ballot, the passage of an election does not necessarily render an election-related challenge moot. Such challenges may fall within the "capable of repetition yet evading review" exception to the mootness doctrine. *See Moore v. Ogilvie,* 394 U.S. 814, 816, 89 S. Ct. 1493, 1494 (1969). Where there is a challenge to the validity of a statutory provision that will continue to operate past the election in question and will burden future candidates or voters in future elections, a "continuing controversy" remains. *Id.* "[T]he laws in question remain on the books, and [plaintiff] has standing to challenge them as a member of the class of people affected by the presently written statute." *Schaefer v. Townsend,* 215 F.3d 1031, 1033 (9th Cir. 2000) (quoting *Dunn v. Blumstein,* 405 U.S. 330, 333 n.2, 92 S. Ct. 995, 998 n.2 (1972)). Because the statutes remain unchanged, this

case is capable of repetition. And given the very tight time deadlines imposed by state election law on challenges to nomination petitions, see A.R.S. § 16-351, this case may yet evade review. The action, thus, is not moot.

B

Each provision of a state's election code inevitably affects the right of association and the right to vote. *Anderson v. Celebreeze,* 450 U.S. 780, 788, 103 S. Ct. 1564, 1569-70 (1983). However, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* (quoting *Storer v. Brown,* 415 U.S. 724, 730, 94 S. Ct. 1274, 1279 (1974)). Associating for the purpose of placing a candidate on the ballot is protected by the First Amendment; indeed, the circulation of petitions for ballot access "involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer v. Grant,* 486 U.S. 414, 421-22, 108 S. Ct. 1886, 1892 (1988).

In evaluating the constitutionality of ballot access regulations, a court must carefully weigh competing factors.

> It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to

> vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Anderson, 450 U.S. at 789, 103 S. Ct. at 1570.

A law that severely restricts First Amendment rights will pass muster only if it is narrowly tailored to achieve a compelling state interest. *Libertarian Party v. Munro,* 31 F.3d 759, 761 (9th Cir. 1994) (citing *Burdick v. Takushi,* 504 U.S. 428, 434, 112 S. Ct. 2059, 2063 (1992)). If the burden is slight, however, the procedures will survive as long as they are rationally related to a legitimate interest. *Id.* In evaluating the nature and magnitude of the burden that Arizona's election procedures impose on independent candidates, we must examine the entire regulatory scheme. *Id.* at 761-62. From that vantage, "[t]he question is whether 'reasonably diligent' [independent] candidates can normally gain a place on the ballot, or if instead they only rarely will succeed." *Id.* at 762 (quoting *Storer,* 415 U.S. at 742, 94 S. Ct. at 1285). Plaintiffs have the burden of showing that the challenged laws "seriously restrict the availability of political opportunity." *Id.*

1.

Plaintiffs first challenge the constitutionality of A.R.S. §§ 16-315(B) and 16-321(D), which provide that those who circulate nomination petitions on behalf of political candidates must "be qualified to register to vote" in Arizona.[2] A person is qualified to register to vote if he or she is an Arizona resident, a United States citizen, at least 18 years old by the next general election, not a convicted felon, and an Arizona resident at least 29 days before the election. A.R.S. § 16-101.

Plaintiffs' challenge centers on the requirement that circulators must be Arizona residents. They contend that the residency requirement restricts political expression by limiting the number of voices available to convey their message, and therefore limits the size of the audience they can reach. Moreover, the restriction makes it less likely that an independent candidate will gather the signatures required to get on the ballot, thus limiting the ability to influence public political discussion. Plaintiffs also argue that their First Amendment right to political and expressive association is violated because they are not able to advocate or vote for the candidates they support.

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[2] While the Supreme Court has struck down actual voter registration as a requirement to circulate petitions, it had no occasion to address residence requirements. *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 119 S. Ct. 6361 (1999).

A state has a compelling interest in protecting the integrity and fairness of the electoral process and in "ensuring that an individual's right to vote is not undermined by fraud in the election process." *Burson v. Freeman,* 504 U.S. 191, 199, 112 S. Ct. 1846, 1852 (1992). Here, the State asserts that "[b]y requiring circulators to be Arizona residents, [it] may locate and subpoena circulators to answers questions or, in the event of fraud, to enforce its laws." *Defendant's Motion for Summary Judgment* at 15. The State contends that a history of circulator fraud in Arizona elections shows the necessity of the residency requirement. *DSOF* ¶ 44.

Arizona has an expedited process to challenge nomination petitions. First, an elector must file an action within 10 days of the petition filing deadline. A.R.S. § 16-351(A). The candidate benefits from a presumption that the petitions are valid because the circulator attests to the validity of each signature. Arizona places the burden on the challenging party to identify by petition number and by line each signature alleged to be invalid and to assert the basis for the challenge. *Id.* In order to effectively identify and support petition challenges, an elector may be required to identify and locate circulators, and secure their testimony. Failure to adequately specify the basis for the challenge will result in the dismissal of the action. *Id.*

According to the State, identifying issues, locating circulators and securing their testimony in just 10 days would be virtually impossible if circulators could

not be readily located and made available to testify, particularly given that professional circulators oftentimes operate as "migratory workers," leaving the state as soon as the petition drive is completed. *See McDowell Mountain Ranch Land Coalition v. Vizcaino,* 190 Ariz. 1, 4, 945 P.2d 312, 315 (1997).[3]

We agree that the State has a compelling interest in protecting the petition process from fraud and abuse, and to ensure the State's subpoena power in order to accomplish these goals. Under Arizona's statutory framework, an elector would be hard pressed to raise an effective challenge to a nomination petition without access to the person who collected the contested signatures. Given the fact that independent candidates have access to approximately 3.7 millions Arizona residents who are eligible to circulate petitions, *DSOF* ¶ 7, any interference with plaintiffs' right to political expression is limited and justified by the State's compelling interest in protecting the integrity of the election process.

Plaintiffs argue that Arizona's statutory scheme is not narrowly tailored to satisfy the State's interests. Plaintiffs claim that because § 16-101(A)(3) only requires residency 29 days before an election, a circulator need not be a resident at the time of a petition drive, thereby defeating the State's interests in ensuring subpoena power at the time of a petition

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[3] The Nader campaign contracted with JSM, Inc., a Florida corporation, to circulate petitions in Arizona. *DSOF, Exhibit 8.*

challenge. But plaintiffs ignore the introductory sentence of A.R.S. § 16-101(A), which provides that, "[e]very *resident* of the state is qualified to vote if. . . ." (Emphasis added). The first qualification for voter eligibility under § 16-101(A) is that a person be a "resident." Subparagraph (3) imposes the additional requirement that a resident must have been a resident for 29 days before the election. A person must be an Arizona resident at the time of the petition drive in order to circulate a petition.

We conclude that Arizona's circulator residency requirement does not violate plaintiffs' First Amendment rights. The harm to plaintiffs' rights is minimal, if at all, while the State's interest in the integrity of the process is substantial.

2.

Plaintiffs next challenge statutes that require nomination petitions of independent candidates to be filed not less than 90 days before the primary election. *See* A.R.S. §§ 16-341(C), 16-311(A). In 2004, the filing deadline was June 9th. Plaintiffs contend that this deadline discriminates against independent candidates who are required to identify themselves and file nomination petitions before the major political parties have chosen their candidates for the general election. They argue that Arizona's June 9th filing deadline imposes an unconstitutional burden on the speech and associational rights of independent candidates and voters who might support them.

In *Anderson,* the Supreme Court found a mid-March filing deadline unconstitutional because it could not be justified by the state's asserted interest in protecting political stability. 450 U.S. 780, 805-06, 103 S. Ct. 1564, 1579 (1983). The Court examined the burdens imposed on speech and associational rights by an early filing deadline, and noted that issues and candidates do not remain static over the course of an election campaign. *Id.* at 790, 103 S. Ct. at 1570. Imposing an early filing deadline deprives alternative political parties of the opportunity to recruit and nominate candidates, and deprives them of the ability to react to events occurring after the filing deadline. An early filing deadline may require candidates to gather signatures at a time when the election is remote and voters are generally uninterested in the campaign. *Id.* at 792, 103 S. Ct. at 1572.

Given these burdens on plaintiffs' rights, we now turn to the State's justifications for its filing deadline. The State contends that adequate time must be available between the petition deadline and the general election to allow challenges to the validity of petitions to be raised and adjudicated. The State contends that the deadline is necessary to allow sufficient time to print and distribute ballots that will contain the names of all the candidates. The ballots must be printed well before the general election so that they can be distributed to registered voters who vote by absentee or early ballot.

In 2004, Arizona's filing deadline fell only 146 days before the general election – 83 days closer than

the deadline in *Anderson*. Early voting begins in Arizona 33 days before the general election, A.R.S. § 16-545, and ballots must be mailed to members of military overseas at least 45 days before the election. With early voting, the period between Arizona's filing deadline and the date voting begins is only 113 days – less than half the period considered in *Anderson*. After the filing deadline and during this 113-day period, Arizona law provides for challenges to a candidate's petitions or his qualifications for office. A.R.S. § 16-351. This challenge process must be completed before ballots can be printed.

The State asserts that the presidential primary process has changed since *Anderson* was decided more than 20 years ago. In 2004, ten states held their primary elections on "Super Tuesday," which fell on March 2nd. Arizona's presidential preference election was held on February 3rd, well before the June filing deadline. As the Seventh Circuit noted with respect to the 2004 election, "[l]ong before the June deadline it was not only certain who the major parties' candidates would be but their positions were well known, the candidates were campaigning vigorously, there was a high level of public interest in the campaign, [and] Nader himself had been campaigning since February." *Nader v. Keith,* 385 F.3d 729, 736 (7th Cir. 2004). Thus, many of the concerns raised in *Anderson* do not have the same significance today.

Here, Nader declared his candidacy on February 22, 2004, giving him 107 days to collect the requisite

number of signatures. Yet Nader did not begin circulating petitions until April, and waited until just two weeks before the deadline to collect more than 90 percent of his signatures. "The question is whether 'reasonably diligent' minor party candidates can normally gain a place on the ballot, or if instead they only rarely will succeed." *Libertarian Party v. Munro,* 31 F.3d at 762 (citing *Storer,* 415 U.S. at 742, 94 S. Ct. at 1285). Nader's failure to get on the ballot was caused by his failure to start earlier.

We conclude that Arizona's filing deadline is not more burdensome than necessary to support its compelling interests in allowing sufficient time to verify signatures, allow for challenges to petitions, and to print and distribute ballots for early and oversees voting. It is thus constitutional.[4]

III

IT IS ORDERED GRANTING defendant's Motion for Summary Judgment (doc. 45). **IT IS FURTHER ORDERED DENYING** plaintiffs' Motion for Summary Judgment (doc. 47).

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[4] We note in passing that the Arizona Supreme Court reached the same conclusion. *See Browne v. Bayless,* 202 Ariz. 405, 46 P.3d 416 (2002), *cert. denied,* 537 U.S. 1088, 123 S. Ct. 696 (2002).

DATED this 8th day of June, 2006.

/s/ Frederick J. Martone
Frederick J. Martone
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RALPH NADER; DONALD N. DAIEN, Plaintiffs-Appellants, v. JANICE BREWER, in here [sic] official capacity as Secretary of State of Arizona, Defendant-Appellee.	No. 06-16251 D.C. No. CV-04-01699-FJM District of Arizona, Phoenix ORDER (Filed Aug. 15, 2008)

Before: SCHROEDER, CLIFTON, and CALLAHAN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX D

A.R.S. § 16-101. *Qualifications of registrant; definition*

A. Every resident of the state is qualified to register to vote if he:

1. Is a citizen of the United States.

2. Will be eighteen years of age or more on or before the date of the regular general election next following his registration.

3. Will have been a resident of the state twenty-nine days next preceding the election, except as provided in section 16-126.

4. Is able to write his name or make his mark, unless prevented from so doing by physical disability.

5. Has not been convicted of treason or a felony, unless restored to civil rights.

6. Has not been adjudicated an incapacitated person as defined in section 14-5101.

B. For purposes of this title, "resident" means an individual who has actual physical presence in this state, or for purposes of a political subdivision actual physical presence in the political subdivision, combined with an intent to remain. A temporary absence does not result in a loss of residence if the individual has an intent to return following his absence. An individual has only one residence for purposes of this title.

A.R.S. § 16-311. *Nomination papers; filing; definitions*

A. Any person desiring to become a candidate at a primary election for a political party and to have the person's name printed on the official ballot shall be a qualified elector of such party and, not less than ninety nor more than one hundred twenty days before the primary election, shall sign and cause to be filed a nomination paper giving the person's actual residence address or description of place of residence and post office address, naming the party of which the person desires to become a candidate, stating the office and district or precinct, if any, for which the person offers the person's candidacy, stating the exact manner in which the person desires to have the person's name printed on the official ballot pursuant to subsection G, and giving the date of the primary election and, if nominated, the date of the general election at which the person desires to become a candidate. A candidate for public office shall be a qualified elector at the time of filing and shall reside in the county, district or precinct which the person proposes to represent.

* * *

A.R.S. § 16-321. *Signing and certification of nomination petition*

A. Each signer of a nomination petition shall sign only one petition for the same office unless more than one candidate is to be elected to such office, and in that case not more than the number of nomination

petitions equal to the number of candidates to be elected to the office. A signature shall not be counted on a nomination petition unless the signature is upon a sheet bearing the form prescribed by section 16-314.

B. For the purposes of petitions filed pursuant to sections 16-312, 16-313, 16-314 and 16-341, each signer of a nomination petition shall be a voter who at the time of signing is a registered voter in the electoral district of the office the candidate is seeking.

C. If an elector signs more nomination petitions than permitted by subsection A of this section, the earlier signatures of the elector are deemed valid, as determined by the date of the signature as shown on the petitions. If the signatures by the elector are dated on the same day, all signatures by that elector on that day are deemed invalid. Any signature by that elector on a nomination petition on or after the date of the last otherwise valid signature is deemed invalid and and shall not be counted.

D. The person before whom the signatures were written on the signature sheet shall be qualified to register to vote in this state pursuant to section 16-101 and shall verify that each of the names on the petition was signed in his presence on the date indicated, and that in his belief each signer was a qualified elector who resides at the address given as the signer's residence on the date indicated and, if for a partisan election, that each signer is a member of the party from which the candidate is seeking nomination, or the signer is a member of a political party

that is not entitled to continued representation on the ballot pursuant to section 16-804 or the signer is registered as independent or no party preferred. The way the name appears on the petition shall be the name used in determining the validity of the name for any legal purpose pursuant to the election laws of this state. Signature and handwriting comparisons may be made.

A.R.S. § 16-341. *Nomination petition; method and time of filing; form; qualifications and number of petitioners required*

A. Any qualified elector who is not a registered member of a political party that is recognized pursuant to this title may be nominated a candidate for public office otherwise than by primary election or by party committee pursuant to this section.

B. This article shall not be used to place on the general election ballot the name of a political party which fails to meet the qualifications specified in section 16-802 or 16-804, or the name of any candidate representing such party or the name of a candidate who has filed a nomination petition in the immediately preceding primary election and has failed to qualify as the result of an insufficient number of valid signatures.

C. A nomination petition stating the name of the office to be filled, the name and residence of the candidate and other information required by this

section shall be filed at the same time and with the same officer with whom primary nomination papers and petitions are required to be flied as prescribed in section 16-311. The petition shall be signed only by voters who have not signed the nomination petitions of a candidate for the office to be voted for at that primary election.

D. The nomination petition shall be in substantially the following form:

"The undersigned, qualified electors of ___ county, state of Arizona, do hereby nominate ___, who resides at ___ in the county of ___ as a candidate for the office of ___, at the general (or special, as the case may be) election to be held on the ___ day of ___, ___.

I hereby declare that I have not signed the nomination petitions of any candidate for the office to be voted for at this primary election, and I do hereby select the following designation under which name the said candidate shall be placed on the official ballot (here insert such designation not exceeding three words in length as the signers may select)."

E. The nomination petition shall conform as nearly as possible to the provisions relating to nomination petitions of candidates to be voted for at primary elections and shall be signed by at least the number of persons who are registered to vote determined by calculating three per cent of the persons who are registered to vote of the state, county, subdivision or district for which the candidate is nominated who are not members of a political party that is qualified to be

represented by an official party ballot at the next ensuing primary election and accorded representation on the general election ballot.

F. The percentage of persons who are registered to vote necessary to sign the nomination petition shall be determined by the total number of registered voters from other than political parties that are qualified to be represented by an official party ballot at the next ensuing primary election and accorded representation on the general election ballot in the state, county, subdivision or district on March 1 of the year in which the general election is held. Notwithstanding the method prescribed by subsection E of this section and this subsection for calculating the minimum number of signatures necessary, any person who is registered to vote in the state, county, subdivision or district for which the candidate is nominated is eligible to sign the nomination petition without regard to the signer's party affiliation.

G. For the purposes of this section, a nomination petition for the office of presidential elector shall include a group of names of candidates equal to the number of United States senators and representatives in Congress from this state instead of separate nomination petitions for each candidate for the office of presidential elector. A valid signature on a petition containing a group of presidential electors candidates is counted as a signature for the nomination of each of the candidates. The presidential candidate whom the candidates for presidential elector will represent shall designate in writing to the secretary of state the

names of the candidates who will represent the presidential candidate before any signatures for the candidate can be accepted for filing.

H. A person who files a nomination paper pursuant to this section for the office of president of the United States shall designate in writing to the secretary of state at the time of filing the name of the candidate's vice-presidential running mate, the names of the presidential electors who will represent that candidate and a statement that is signed by the vice-presidential running mate and the designated presidential electors and that indicates their consent to be designated. A nomination paper for each presidential elector designated shall be filed with the candidate's nomination paper. The number of presidential electors shall equal the number of United States senators and representatives in Congress from this state.

I. A candidate who does not file a timely nomination petition that complies with this section is not eligible to have the candidate's name printed on the official ballot for that office. The filing officer shall not accept the nomination paper of a candidate for state or local office unless the candidate provides or has provided all of the following:

1. The nomination petition required by this title.

2. A political committee statement of organization or the five hundred dollar threshold exemption statement for that office.

3. The financial disclosure statement as prescribed for candidates for that office.

19 (3)

No. 08-648

Supreme Court, U.S.
FILED
FEB 5 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JANICE BREWER, IN HER OFFICIAL CAPACITY
AS ARIZONA SECRETARY OF STATE,
Petitioner,

v.

RALPH NADER AND DONALD N. DAIEN,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

ROBERT G. BERNHOFT
Counsel of Record
ROBERT E. BARNES
Of Counsel
THE BERNHOFT LAW FIRM, S.C.
207 E. BUFFALO STREET, SUITE 600
MILWAUKEE, WISCONSIN 53202
(414) 276-3333 TELEPHONE

Counsel for Respondents

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether this Court should grant review to allow Arizona to use residency as a proxy for fraud by banning all non-Arizonan Americans from engaging in the core political speech of circulating Presidential nomination petitions in a national election for the Presidency?

2. Whether this Court should grant review to allow Arizona to impose a pre-primary ballot deadline for a general election candidate, a deadline currently 153 days in advance of the general election, before the party candidates are even determined, where Arizona cannot even provide an "internally consistent" explanation for the unique and a-historical deadline imposed on independent candidates?

LIST OF PARTIES

On January 21, 2009, Janice Brewer ("Brewer") was inaugurated as the Governor of the state of Arizona. Ken Bennett has succeeded Brewer as Arizona's Secretary of State.

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ARGUMENT

Arizona and amici mask the isolated nature of their position, disclosed in how few states employ such residency bans on core political speech and restrictive methods of ballot inclusion. In so doing, Arizona and amici inflate a circuit split, ignore the modern trends, and ask the court abandon the Constitutional policies behind its precedents and the near-uniform scholastic opinion. The salutary, scholarly, and succinct opinion of the Ninth Circuit, crafted by the long-respected chief judge herself, precedent-conforming, and scholastically well-received, valuably contributes to the decisional law of this area of Constitutional concern and democratic access, as most evident by the Sixth and Tenth Circuit appellate panels following its logic within months of its issuance. *See Nader v. Blackwell*, 545 F.3d 459, 475 (6th Cir. 2008) and *Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1028 (10th Cir. 2008). Given the decision's proper application of strict scrutiny where the judicially found facts and trial court record demonstrate a discriminatory and severe burden on First Amendment protected rights, the *de minimis* conflict with the scattering of occasional and usually outdated Circuit or state opinions (decisions marked with dissimilar facts not even addressing modern arguments), this case does neither compel nor recommend the granting of certiorari merely to absolve the election laws of the last remaining dissident states.

I. THE PARTIES AND RIGHTS INVOLVED.

Ralph Nader announced his candidacy as an independent candidate for the Presidency. (R. 46, ¶ 37.) Nader resides in the state of Connecticut. (R. 46, #5 Exhibit.) Donald Daien is a registered voter in

the state of Arizona. (R. 46, #6 Exhibit, p. 5.) Daien was a known Nader supporter in Arizona. Brewer is the Secretary of State for the State of Arizona. (R. 46, #1 Exhibit, ¶ 1.) The Secretary is charged with the administration and enforcement of the state's election laws. (R. 32, Answer, ¶ 10.) The rights at issue center on the First Amendment rights to assemble and speech.

II. STATUTORY FRAMEWORK.

It does not matter how many voters want to include the option of an independent on the ballot in Arizona; rather, it only matters that 3% of all independent registered voters in the state sign a nominating petition circulated by a resident of Arizona and that said petition be submitted at least 153 days before the general election. Voters cannot sign nomination petitions except in the presence of a circulator; voters cannot include an independent on the Arizona residential ballot but by nominating petition. Ariz. Rev. Stat. §§ 16-311, 16-341. Circulators must be qualified to vote in Arizona at the time they circulate the petition. Ariz. Rev. Stat. §§ 16-315, 16-321. To be qualified to vote, the circulator must be an Arizona resident 29 days before the election. Ariz. Rev. Stat. § 16-101. Even if every Arizona voter in the state signed the petition, the state cannot accept a petition circulated by a non-resident. *Id.* Arizona law prohibited Nader himself from circulating petitions on behalf of his own candidacy. *Id.* Arizona law prohibited more than 200,000,000 Americans from circulating petitions in a national election in which they each had a stake.

An independent candidate for President must submit nomination papers to be placed on the ballot. Ariz. Rev. Stat. §§ 16-311, 16-341. This is not the case for partisan Presidential candidates, who do not have to submit any such nomination petitions for the partisan presidential preference primaries. Ariz. Rev. Stat. § 16-242. The nomination petition for Independent presidential candidates must be signed by at least 3% of qualified electors who are not registered as members of a recognized political party. Ariz. Rev. Stat. §§ 16-311, 16-341. This equaled 14,694 verified signatures on public nominating petitions by then-registered voters, the highest signature requirement in the state for elective office, and continues to rise with the rise of the number of nonpartisan registered voters in Arizona. *Compare* Ariz. Rev. Stat. §§ 16-322, 16-341 and 16-801. The petitioning deadline for nominating Independent candidates for the November general election ballot for President closed on June 9, 2004, the deadline for September primary candidates to submit their petitions. Ariz. Rev. Stat. § 16-311. Notably, primary candidates enjoy a 90-day deadline; independents alone face a 153-day deadline. Ariz. Rev. Stat. §§ 16-311, 16-322, and 16-341.

Voters are not allowed to signal their support for a candidate through media recognition, public opinion surveys, or in any anonymous way (such as confidential postcards or the equivalence of absentee ballots). Instead, voters must sign a public nominating petition in the presence of a circulator and those petitions are available to the public, unlike a person's ballot. In 1993, after Arizona saw two independent candidates for the Presidency make the ballot and win record votes from Arizonans, Arizona party-dominated

legislature imposed one of the earliest deadlines in the nation, moving the deadline from September after the partisan primaries, to early June, and further imposed a party litmus test on signatories (limiting independent candidates to just those Arizona voters who are not registered members of any political party). 1993 Arizona Session Laws, ch. 98. The latter restriction has already been declared unconstitutional by the Arizona district court. *See Campbell v. Hull*, 73 F. Supp. 2d 1081 (D. Ariz. 1999). Even though 150,000 Arizonans, in public surveys by independent public universities in the state, expressed their interest in voting for Nader in 2004, Nader was unable to overcome the limited pool of circulators, the limited audience he could reach with limited circulators, and the early timeline for access to the ballot. Nader was consequently not on the 2004 Arizona ballot, while he was on the ballot in most other states.

Under the state-asserted objective that Arizonans would be too confused to express their choices on the ballot if they had too many choices, Arizona imposes selective signature requirements on those seeking access to the ballot. However, Arizona employs no consistent standards for how many public signatures are needed for the supposed public goal of avoiding voter confusion, deception or frustration from too many choices on an Arizona ballot for statewide office. *Compare* Ariz. Rev. Stat. §§ 16-322, 16-341 and 16-801. For example, no signatures at all are needed to qualify for the state presidential preference ballot. Ariz. Rev. Stat. § 16-242. For statewide partisan candidates other than the presidential preference primary, the number of signatures required to avoid confusion is set as low as 75 signatures. Ariz. Rev. Stat. §§ 16-322, 16-804. In 2004, a Libertarian candidate for statewide

office needed signatures equaling only one-half of one percent of the party's registration in the state, or 82 signatures, to avoid voter confusion on the ballot. Ariz. Rev. Stat. § 16-322(B); *see also* State of Arizona Registration Report, March 1, 2004. While no party candidate for President needs any signatures, the Republican statewide non-Presidential candidates need only 4603 signatures while a Democratic statewide candidate need only 4037. Ariz. Rev. Stat. § 16-322; *see also* State of Arizona Official Canvas 2002 Elections. For partisan candidates without party registrants, the access to the statewide ballot can be as low as 566 signatures. Ariz. Rev. Stat. § 16-322(c); *see also* State of Arizona Official Canvas 2002 Elections. Indeed, a new party can be formed with fewer signatures than an independent candidate must gather – a mere 8375 signatures in 2004. Ariz. Rev. Stat. § 16-801; *see also* State of Arizona Official Canvas 2002 Elections. By contrast, an independent candidate for the Presidency required 14,694 verified signatures for Arizona voters to include their choice on the ballot. *Compare* Ariz. Rev. Stat. §§ 16-322, 16-341 and 16-801. This is because independent candidates have the highest percentage requirement of any candidate in the state.

The variance in signature requirements recurs in the variance in deadlines to submit nomination petitions. For partisan presidential candidates in the presidential primary, the deadline is a mere forty days prior to the election. Ariz. Rev. Stat. § 16-242. For other statewide candidates in the primary, the deadline is ninety days prior to the election. Ariz. Rev. Stat. § 16-311. For independent candidates, however, the deadline is one hundred and forty-six days prior to the election – ninety days prior to the primary, which

is usually fifty-one days prior to the general election. Ariz. Rev. Stat. §§ 16-314, 16-341. The practical effect of this provision is to prohibit an independent candidate from emerging after the deadline for partisan candidates to submit their names for the primary ballot or an independent emerging as a result of developments during the primary campaign within the state or during the conventions.

The history of the law governing the deadline for independent Presidential candidates is equally unusual. The original government-printed ballot of 1891 set the deadline at 20 days before the general election. *See* 1891 Arizona Territory Session Laws, ch. 64, p. 83. In 1909, this was changed to ten days after the September primary. *See* 1909 Arizona Territory Session Laws, ch. 64, p. 65. This September deadline remained the law until 1993. Arizona's deadline suddenly jumped from September to June after independent candidates for the Presidency received record votes in the state in the 1992 presidential election. Following the 1992 election, in 1993, Arizona's party-dominated legislature suddenly reversed a hundred years of established practice. 1993 Arizona Session Laws, ch. 98. The new law required independent petitions seeking access to the November general election ballot be submitted on the same day in June on which primary candidates seeking a place on the September primary ballot were required to submit their petitions. *Id.*, § 24, p. 307. A third change in 1999 occurred in Arizona, where the legislature changed the deadline from late June to early June. 1999 Arizona Session Laws, ch. 224, § 1. The 1993 law dramatically moved back the deadline for independents, even though independent candidates

did not participate in the primary and without any logical justification.

Additionally, Arizona's June deadline is not in conformity with the custom of sister states nor with its own history; equally, Arizona's signature requirement for nominating petitions, the lack of alternatives to nominating petitions, and the residency requirement for circulators are also contrary to the custom of most states. The median deadline across the nation has, since the inception of the state controlled ballot, been between August and October. *See* Richard Winger, *How Many Parties Ought To Be On the Ballot?: An Analysis of Nader v. Keith*, 5 Election L.J. 170 (2006). Thirty-six of the fifty states do not impose deadlines until the convention season in August, and thirteen of those states do not impose deadlines until September, as Arizona did for so long until the success of the independent Presidential candidates in 1992. *Id.* at 192. Arizona's signature requirements for independents also steadily increased, and the 14,694 signatures, as a percentage of the national electorate, is one of the highest in the nation. *Id.* at 196. The median number of signatures required has ranged between 0.1% and 0.6% of the number of votes cast in the state, which would equal between 1,000 and 6,000 signatures in Arizona, for an average of 3,500 signatures. *Id.* at 175, Table 2.

> To put the current 635,000-signature requirement to get on the ballot in all states for an independent in perspective, note that a Democrat seeking his or her party's presidential nomination in 2004 could obtain a place on all presidential primary ballots with just 27,000 valid signatures (assuming the candidate is

> someone who is discussed in the news media or who qualifies for federal matching funds). The only mandatory petitions in 2004 Democratic presidential primaries were: Alabama 500 (17-16A-3), Illinois 3,000 (10ILCS5/7-10), Indiana 4,500 (3-8-3-2), New Jersey 1,000 (19:25-3), New York 5,000 (Ch. 17,2-122), Pennsylvania 2,000 (Title 25, sec. 2911), Vermont 1,000 (Title 17, sec. 2702), Virginia 10,000 (24.2-545). For Republicans, the total was 22,000 (New York Republicans could get on automatically, with no petition needed, if they qualified for matching funds, or if they were discussed in the news media).

Id. at 176, n.40.

A host of technical requirements impose further restrictions: circulators must use select forms in precise conformity with extended regulations and laws; a voter's signature is stricken if it does not match the confidential signature on the voter card, the address listed on the voter card, or the voter's precise name; there is no confidentiality as to who signed a nominating petition from their public or political adversaries; and privatized petition lawsuits are only applicable as to *independent* presidential candidates. Ariz. Rev. Stat. §§ 16-242; 16-314; 16-321; 16-341; 16-351. Arizona's county register system allows verification of signatures by comparing the signature and address of the voter on his registration card with the nomination petition. Ariz. Rev. Stat. § 16-351. Arizona criminalizes various election related conduct. Ariz. Rev. Stat. §§ 16-184; 16-1004; 16-1010; 16-1020.

III. HISTORY OF ELECTION LAWS.

State control of the ballot was foreign to the founders of America. *See* Richard Winger, "History of U.S. Ballot Access Law for New and Minor Parties," *The Encyclopedia of Third Parties in America*, Vol. 1 (2000); *see also* A. Ludington, *American Ballot Laws, 1888-1910* (1911). The invention of the state ballot originated in the late nineteenth century. *See id.* Before that, voters and their supporters could bring their own ballot to the voting polls. *See id.* Most states adopted the state ballot and employed free and open ballot access to be as inclusive as many voter options as possible, with few ballot access restrictions, during most of the first half-century of state ballots. *See id.*

This period of open ballot birthed some of the most significant independent political efforts outside the two-party system in our history. *See e.g.*, John D. Hicks, *The Third Party Tradition in American Politics*, 20 Miss. Valley. Hist. Rev. 3 (1933). The collective efforts of outsider candidacies are widely credited as creating the most significant and beneficial reforms in American political history as the "fertile" bed of new ideas. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *see also Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) ("The States' interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the political development of the Nation.")

Outsider options through third-party campaigns or candidacies provide the most effective method of expression by those feeling excluded from the two-

party system, but does so within the system: channeling dissent through democratic means and giving voice to that dissent. This type of dissent led to abolition, direct election of senators, the right of women and draft-eligible citizens to vote, the right to overtime, the limits on child labor, aid to farmers, and expanded participation in the public arena with more confidence in American institutions as representative of them. *See e.g.*, John D. Hicks, *The Third Party Tradition in American Politics*, 20 Miss. Valley. Hist. Rev. 3 (1933); A. Ranney & W. Kendall, *Democracy & the American Party System*, W. Pol. Q., Vol. 9, No. 4, p. 1015 (Dec. 1956); W. Goodman, *The Two-Party System in the United States*, (Princeton: D. Van Nostrand Co. 1957); Daniel A. Mazmanian, *Third Parties in Presidential Elections*, W. Pol. Q., Vol 27, No. 4, p. 779 (Dec. 1974); G. Sartori, *Parties and Party Systems*, (Cambridge Univ. Press 1976); Steven J. Rosenstone, Roy L. Behr & Edward H. Lazarus, *Third Parties in America*, (Princeton Univ. Press 1984).

It was only when third parties and candidates outside the party system began to seriously challenge for power or reshape the debate in ways the political incumbents found threatening that state approaches to the state ballot began to change. *See e.g.*, Richard H. Pildes, *The Theory of Political Competition*, 85 Va. L. Rev. 1605, 1617 (Nov. 1999) (noting "the history of ballot access restrictions which get elevated just as serious new parties or independent candidates emerge as threats"); James Reichley, "The Future of the Two-Party System After 1996", in *The State of the Parties* (John C. Green & Daniel M. Shea, eds., 3rd ed. 1999) ("The representatives of the two major parties have taken pains to enact election laws that strongly favor major party candidates"); *The Law of Democracy:*

Legal Structure of the Political Process (Samuel Issacharoff, Pamela S. Karlan, & Richard H. Pildes, eds., Foundation Press, 2nd ed. 2001) (noting "the self-interest existing power holders have in manipulating the ground rules of democracy in furtherance of their own partisan, ideological, and personal interests"); Brian P. Marron, *Doubting America's Sacred Duopoly: Disestablishment Theory & The Two-Party System*, 6 Tex. F. on C.L. & C.R. 303 (2002); Samuel Issacharoff, *Oversight of Regulated Political Markets*, 24 Harv. J.L & Pub. Policy 91, 96-97 (2000) (the natural side effect of politicians overseeing the terms and conditions of their competition is to limit that competition through ballot rules).

With the slow, steady closing of the ballot, more and more independent and outside parties disappeared from potential choices for voters, disappeared from the public discourse, and disappeared from the public consciousness. Other scholars note how badly these restrictions limit the marketplace of ideas the First Amendment was intended to promote and protect. *See* Steven Rosenstone, *Restricting the Marketplace of Ideas: Third Parties, Media Candidates & Forbes' Imprecise Standards*, 18 St. Louis U. Pub. L. Rev. 485 (1999). This honorable court concurred in its seminal decision in *Anderson v. Celebrezze*, 460 U.S. at 805.

The public increasingly concurs, as they refuse partisan labels in registration, voting patterns and public opinion, while seeking more options for debate participants in Presidential debates and more options for choices on the ballot. *See* The Appleseed Center for Electoral Reform and the Harvard Legislative Research Bureau, *A Model Act for the Democratization of Ballot Access*, 36 Harv. J. on Legislation 451, 454

(noting wide spread public desire for third options outside the two-party system in consistent public opinion surveys). The irony in states like Arizona is that the more voters refuse to align with partisan registration, the more difficult it is to include independents on the ballot, as the signature requirements increase proportionally.

IV. REASONS FOR DENYING THE PETITION.

As the overwhelming majority of Circuits and states reject Arizona's residency ban on circulators and co-equally reject Arizona's early June, pre-primary deadline for independent presidential candidates for the general election ballot, and just as the overwhelming trends amongst sister Circuits and lower court decisions agree with both the application of strict scrutiny to comparable laws and factual settings and with the conclusions of the Ninth Circuit, this case does not warrant *certiorari*. Only a small minority of states imposes and only one Circuit approves a residency ban on circulator speech, substituting a person's residency as a proxy for one's propensity to commit criminal fraud. Only a small minority of the states imposes primary-based deadlines on general election independent candidates and even fewer impose deadlines in early June for a November election ballot.

A. The Ninth Circuit Decision on the Rights of Non-Residents to Circulate Nominating Petitions for the Presidency Conforms to This Court's Precedents, the Overwhelming Trend Amongst Both Circuits and Sister States.

Petition circulation is "core political speech" and protecting such speech reaches its "zenith" when someone is circulating a petition. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988)). This requires "exacting" and "strict" scrutiny for any limitation on that core political speech. *Meyer*, 486 U.S. at 421; *see also Buckley*, 525 U.S. 182. This is because elections are as much a means of disseminating ideas and expressing dissent as they are means of attaining office and political objectives. *See Socialist Workers Party*, 440 U.S. at 186.

In *Buckley*, the Supreme Court found unconstitutional the same logic Arizona employed here: limiting speech rights to the electorate. Since *Buckley* was decided, the federal courts routinely and regularly struck down state law requirements that petition circulators could only circulate petitions to those in the same area where they could vote for federal elections. *See Krislov v. Rednour*, 226 F.3d 851, 858-66 (7th Cir. 2000); *see also Frami v. Ponto*, 225 F. Supp. 2d 962 (W.D. Wis. 2003).

Twelve Circuit judges from four different Circuits examined the same resident-only petition circulator issue and came to a unanimous conclusion: prohibiting all non-residents from circulating petitions violated their First Amendment rights. *See e.g., Nader*

v. Brewer, 531 F.3d 1028 (9th Cir. 2008); *Yes on Term Limits*, 550 F.3d 1023; *Nader v. Blackwell*, 545 F.3d 459; *Krislov v. Rednour*, 226 F.3d 851.

Every Circuit applying strict scrutiny, including the Sixth Circuit, the Seventh Circuit and Tenth Circuit, agrees banning all non-residents from core political speech cannot conform to First Amendment protections. The plain logic of the First and Second Circuit decisions in analogous cases concurs. *See Lerman v. Bd. of Elections in the City of New York*, 232 F.3d 135 (2nd Cir. 2000) and *Perez-Guzman v. Gracia*, 346 F.3d 229 (1st Cir. 2003). Only one circuit, in a dissimilar case, and from 2001, which did not manifestly apply strict scrutiny, addressed to the limited issue of the in-state ballot initiative, and which did not address the multiple alternative means of the state to prevent fraud without banning all non-resident speech, disagreed. *See Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614, 617 (8th Cir. 2001). Aside from its dubious failure to apparently apply strict scrutiny, the Eighth Circuit's early decision, deviant from the established trend, expressly relied on two rejected assumptions: first, that the focus should be on the amount of speech included, rather than excluded, *Jaeger*, 241 F.3d at 617 ("[M]any alternative means remain to non-residents who wish to communicate their views."); second, that the state had a "grassroots" interest in excluding outside agitators, *id.* at 616. The first assumption was rejected in *Buckley* when the Court struck down a law that "'imposes a burden on political expression that the State has failed to justify.'" *Buckley*, 525 U.S. at 195 (quoting *Meyer*, 486 U.S. at 428) and the second has been rejected by almost all courts in the country that have considered residency

requirements. *See also Lawrence v. Jones*, 18 P.3d 1245 (Ariz. App. 2001) (ruling that cities cannot limit circulator rights to city voters); 1999 Nev. Op. Atty. Gen. No. 37 (Dec. 1, 1999) (Nevada provisions requiring initiative petition circulators to be registered voters are unenforceable); 82 Ops. Cal. Atty. Gen. 250 (Dec. 22, 1999) (circulators of initiative petitions need not declare they are residents and voters).

A similar logic led multiple courts to strike down circulator restrictions that limited circulators to the local voting pool. *See e.g.*, *Morrill v. Weaver*, 224 F. Supp. 882, 904 (E.D. Penn 2002) (holding Pennsylvania in-district residency requirement unconstitutional); *Chandler v. City of Arvada, Colorado*, 292 F.3d 1236 (10th Cir. 2002); *Lerman*, 232 F.3d at 145-54 (holding unconstitutional New York's requirement that witnesses to ballot access designating petitions be resident of the political subdivision); *Nader 2000 Primary Comm., Inc. v. Hechler*, 112 F. Supp. 2d 575, 579 (S.D.W. Va. 2000) (granting preliminary injunction by finding "*Buckley* strongly suggests the West Virginia statute's resident voter requirement for petition circulators is presumptively unconstitutional.").

The Seventh Circuit Court of Appeals proved seminal. In *Krislov*, the Seventh Circuit found unconstitutional a residency requirement on the same logic applicable here. The court took particular aim at the exclusion of out of state residents, even though that election only involved a state officeholder. The Seventh Circuit concluded:

> [T]hc First and Fourteenth Amendments compel States to allow their candidates to

> associate with non-residents for political purposes and to utilize non-residents to speak on their behalf in soliciting signatures for ballot access petitions.

Krislov, 226 F.3d at 865.

The District Court for the Western District of Wisconsin concurred holding that Wisconsin's petition circulation scheme may not prohibit out of state circulators, even if the electoral office was only a state office. *See Frami v. Ponto*, 225 F. Supp. 2d 962 (W.D. Wis. 2003). Judge Crabb held that the residency requirement was not narrowly tailored to meet any compelling state interest.

> Such laws are harmful to the unity of our Nation because they penalize and discriminate against candidates who wish to associate with and utilize the speech of non-residents. **A desire to fence out non-residents' political speech – and to prevent both residents and non-residents from associating for political purposes across district boundaries – simply cannot be reconciled with the First Amendment's** purpose of ensuring the widest possible dissemination of information diverse and antagonistic sources.

Id. at 969 (citing *Krislov*, 226 F.3d at 866) (internal citations omitted) (emphasis added).

As another district court aptly surmised, the "residence of a petition circulator is unrelated to any state interest. As a consequence, such restrictions can rightly be viewed as a device to exclude to minor-party

or independent candidates." *Boddi v. McDaniel*, 2006 WL 2796413 (N.D. Ill. 2006).

Arizona state courts concurred in a comparable context.

> In considering whether a locality had a compelling interest in preventing involvement in the referendum process by "political outsiders," we pointed out that the "grass roots support" interests are already protected by the requirements that only local residents can actually sign the petition and only local residents can actually vote in a local referendum election . . . . Therefore, we concluded, a local residency requirement imposed on referendum petition circulators would "run afoul of the First and Fourteenth Amendments under the principles set forth in *Buckley*."

Lawrence v. Jones, 18 P.3d 1245, 1253 (Ct. App. Ariz. 2001) (quoting *KZPZ Broadcasting, Inc. v. Black Canyon City Concerned Citizens*, 13 P.3d 772, 780 (Ariz. App. 2000)).

Treating non-residents as dangerous outsiders has been routinely criticized. *See Warren v. Fairfax County*, 196 F.3d 186, 199 (4th Cir. 1999) (suggesting in *concurrence* nonresidents cannot be excluded from public forum, which would "balkanize" civic dialogue by geography) (Wilkinson, J., *concurring*); *see also Leydon v. Town of Greenwich*, 777 A.2d 552 (Conn. 2001) (excluding non-residents from public forum offends First Amendment).

> Allowing citizens of the other forty-nine States to circulate petitions increases the opportunity for the free flow of political ideas. In some cases this might entail the introduction of ideas which are novel to a particular geographic area, or which are unpopular. But the First Amendment "was designed to secure the widest possible dissemination of information from diverse and antagonistic sources to assure unfettered interchange of ideas for the bringing about of political and social change desired by the people."

Krislov, 266 F.3d at 866 (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976)).

Arizona, like the small minority of states who still impose these laws, claims a state can prohibit millions of Americans from entering Arizona and engaging in core political speech. This Court, and every Circuit save one, rejected that precise argument. It is the amount of speech prohibited, not the amount of speech permitted, determines First Amendment burdens. Brewer claims there was "no evidence" that the ban on non-residents circulating petitions imposed "a severe burden (or indeed, *any* burden) on the rights of Nader and his supporters." (Petition, p. 16.) However, most of Nader's nationwide supporters are non-Arizonans and all of those non-Arizonans were prohibited from engaging in core political speech, including Nader himself on behalf of his own candidacy, and certainly when a candidate himself is barred from circulating nomination petitions, that is a severe burden on speech. In addition, any Arizonan who would vote in the presidential election but was not a resident in June, was prohibited from circulating petitions, in

contravention of this Court's established precedent in *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

The principal reason advanced by Arizona to justify its residency requirement was the need to subpoena circulators as witnesses. (R. 45, p. 16.) A complete ban on all non-resident circulating petitions – potentially millions of people living outside of Arizona – is not a narrowly tailored means to that interest as evidenced by the following examples of less-intrusive means of regulation.

First, the existing verification methods for voter signatures – through voter registration cards with signatures already on them and, when needed, the testimony of the voter themselves – already protects the state interest in insuring the accuracy of voter signatures. The best evidence, the only reliable evidence, and definitely the only *narrowly-tailored means* to assess competent evidence of valid petition signatures, is the voter registration card with the voter's confidential signature or the testimony of the voters themselves, not the speculation or self-serving testimony of a circulator. This is why so few states even regulate petition circulators in the first place. As the First Circuit held in striking down an attorney-notary requirement for petition circulation, the "in house verification procedure" with authenticating signatures much like Arizona's "compares favorably" to such other restrictions and such restrictions cannot be seen to add "anything over and above other readily available means of verification." *Perez-Guzman*, 346 F.3d at 246.

Second, the state already has the authority to subpoena non-residents for conduct of non-residents

within the state. *See Silverman v. Berkson*, 661 A.2d 1266 (N.J. 1995) (basing its opinion on the doctrine of minimum contacts). The state routinely does this in various material witness cases and non-resident motorist cases, and could equally and easily authorize so here.

Third, the states could easily impose a requirement to agree to service of process as a condition of circulating petitions rather than simply ban all non-residents from circulating presidential petitions. As the Tenth Circuit noted in striking down a similar residency ban:

> The City could achieve its interest without wholly banning nonresidents from circulating petitions in Arvada. As suggested at oral argument, Arvada could require, for example, as a prerequisite to circulating an initiative, referendum, or recall petition in the City, the prospective circulator agree to submit to the jurisdiction of the Arvada Municipal Court for the purpose of subpoena enforcement.

Chandler, 292 F.3d at 1244.

Fourth, the existing laws prohibiting fraud suffice because they directly prevent the fraud, rather than the speech. This conforms precisely to this court's precedents. "The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980). Furthermore, as the Ninth

Circuit previously noted, such a fear of fraud is remote, as is, given the distance to the actual balloting, which is what really matters. *See Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1139 (9th Cir. 2000).

The amicus curiae brief suggests, by quoting *In re Initiative Petition No. 379*, 155 P.3d 32, 42 (Okla. 2006) that state courts have "no ability to ascertain whether a particular voter actually signed a petition" without a circulator's testimony. (Amicus Brief, p. 13.) This is nonsense. The signatures are and can be checked the way they are checked in every city, county and state election board in the nation – first, by checking the signatures against the voter's signature card; and, second, by the voter's own testimony if necessary. Moreover, the amicus curiae brief concedes any circulator would want to appear in court because "negative inferences" would be "drawn from a circulator's unavailability as a witness." *Id.*, p. 15.

The complete ban on non-residents circulating petitions, including the candidate himself, interferes with substantially more speech than necessary to accomplish the state interest in insuring no "voter confusion" on the ballot from "too many choices", the only pretext for requiring the signatures of voters on petitions are accurate signatures in the first instance.

B. The Ninth Circuit Decision That The Rights of Voters, Supporters, and Candidates to an Independent-Inclusive Presidential Ballot Made an Early June Deadline Without Even an "Internally Consistent" Excuse from the State Unconstitutional Conforms to This Court's Precedents and the Overwhelming Trend Amongst Appellate Circuits and Sister States.

Deadlines must be reasonable, nondiscriminatory, and not severe before any scrutiny less than strict scrutiny applies. *See Anderson*, 460 U.S. 780; *see also Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Any burden treating independents as a suspect class for targeting is a severe burden. *Anderson*, 460 U.S. at 792.

This court repeatedly invalidated laws limiting voter choice on the ballot. *See Norman v. Reed*, 502 U.S. 279 (1992) (affirming right of voters, candidate and supporters to include Harold Washington Party candidates' ballot access); *Anderson*, 460 U.S. 780 (affirming right of voters, candidate and supporters to include John B. Anderson's ballot access); *Socialist Workers Party*, 440 U.S. 173 (affirming voters right of voters, candidates, and supporters to inclusion of Socialist Workers Party and U.S. Labor Party ballot access); *Salera v. Tucker*, 399 F. Supp. 1258 (E.D. Penn. 1975), *aff'd*, 424 U.S. 959 (1976) (affirming right of voters, candidate and supporters to include U.S. Labor Party candidate's ballot access); *McCarthy v. Briscoe*, 429 U.S. 1317 (1976) (affirming right of voters, candidate and supporters to include independent candidate Eugene McCarthy's ballot access);

Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974) (affirming right of voters, candidate and supporters to inclusion of Communist Party candidates' ballot access); *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (S.D. NY 1970), *aff'd*, 400 U.S. 806 (affirming right of voters, candidate and supporters to inclusion of Socialist Workers Party and Socialist Labor Party candidates' ballot access); *Amos v. Hadnott*, 394 U.S. 358 (1969) (affirming right of voters, candidate and supporters to inclusion of National Democratic Party of Alabama candidates' ballot access); *Moore v. Ogilvie*, 394 U.S. 814 (1969) (affirming right of voters, candidate and supporters to inclusion of independent un-pledged antiwar presidential electors' ballot access); *Williams v. Rhodes*, 393 U.S. 23 (1968) (affirming right of voters, candidate and supporters to inclusion of American Independent Party candidate's ballot access).

This Court expressly found that seventy-five days should give the Secretary of State adequate time to prepare and print the general election ballot. *Anderson*, 460 U.S. at 800 ("Seventy-five days appears to be a reasonable time for processing the documents submitted by the candidates in preparing the ballot."). Arizona used to do exactly that until 1993, by a deadline in either September or October, and that from the territorial days. The earliness of the deadline – 146 days prior to the election – is both severe and discriminatory.

Cases from federal courts across the country both predating and postdating *Anderson* repeatedly concurred: the interest of the voters in a later deadline for choosing who they want on the ballot trumps the state's interest in keeping those voter

choices off the ballot. *See Nader 2000 Primary Comm., Inc. v. Hazeltine*, 110 F. Supp. 2d 1201, 1208 (D.S.D. 2000) (striking down as unconstitutional, under *Anderson*, an even later deadline than the deadline in Arizona); *McCarthy v. Hardy*, 420 F. Supp. 410 (E.D. La. 1976) (ordering state to put McCarthy on the ballot because right to have choice of candidates matters more than state's interest in imposing limits on ballot); *McCarthy v. Noel*, 420 F. Supp. 799 (D.R.I. 1976) (striking down August 12 deadline for independent candidates because it predated state primary by one month and conventions by two months and treated voters different according to their partisan preferences); *McCarthy v. Kirkpatrick*, 420 F. Supp. 366 (W.D. Mo. 1976) (deadline too early when it predated the state primary and party conventions); *Fulani v. Lau,* Case No. cv-92-535 (Dist. Ariz. 1992) (June deadline too early).

Most states have August or later deadlines, far less signature requirements for petitions, and no residency ban on petition circulators; in our electoral history, that has been the norm for the entire country for most of our electoral history. *See* Winger, *supra*; *see also* Part II, *supra*. Eighteen states impose *de minimis* signature requirements, the increasing trend. *Id.* at 196. The primary fixes the true deadline the state needs for printing ballots since the scope of the ballot is undetermined until then. The state acknowledges the far greater number of primary candidate petitions merely require a deadline of ninety days before the primary election; hence, it had no explanation for why independent candidates required 146 days in 2004 and 153 days in 2008. Their post-hoc, excuse-making for these laws was incredulous to the Ninth Circuit

because the facts simply refuted Arizona's claims. *Nader v. Brewer*, 531 F.3d at 1033.

Brewers' petition misstates critical facts found by the Ninth Circuit. Brewer claims there was no "showing of any burden" that the early filing deadline violated Nader and Daien's First Amendment rights. (Petition, p. 25.) As the Ninth Circuit held, the evidence was that since these new deadlines were instituted, no independent candidate for president ever made the presidential ballot in Arizona. *Nader*, 531 F.3d at 1033.

Arizona imposes a higher signature requirement on independent candidates than anyone else, including statewide partisan presidential candidates, partisan senatorial candidates, partisan gubernatorial candidates, and even partisan candidates for Brewers' office, the Secretary of State. The requirement is not only higher than these other offices; it is anywhere from two times to twenty times higher. The requirement is also higher than most states of the Union for presidential ballot access, with several states successfully employing zero or nominal signature requirements. *See* Winger, *supra*, at 196. Such disparities within a state, especially when they fall disproportionately on insular unrepresented minorities, like independents unaligned to either party, discriminate and cannot be sufficiently tailored to meet any state interest. *See Green Party v. Daniels*, 445 F. Supp. 2d 1056 (E.D. Ark. 2006) (holding that a state cannot impose higher signature requirements to avoid ballot confusion for one group of candidates than another group of candidates seeking access to statewide ballots).

Giving more favorable terms to a minor or major party than an independent candidate in measuring the seriousness of a candidate effectively presumes an independent candidate is iess serious merely according to his status as an independent; as such, such laws cannot pass constitutional scrutiny. *See Baird v. Davoren*, 346 F. Supp. 515 (D. Mass. 1972); *see also Whig Party of Alabama v. Siegelman*, 500 F. Supp. 1195 (N.D. Ala. 1980).

When a law burdens those unprotected by the traditional legislative processes, then judicial scrutiny is particularly apt. "In addition, because the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decision-making may warrant more careful judicial scrutiny." *Anderson*, 460 U.S. at 793, n.16 (emphasis added). This alone – the discriminatory treatment of non-partisan candidates – requires strict scrutiny of these laws. *See Anderson v. Hooper*, 498 F. Supp. 898 (D.N.M. 1980) (having a different deadline for independents than other candidates renders early deadline unconstitutional).

The deadline is also a severe burden because it predates the conventions by months, during the "dead" period of presidential politics, when, as the court noted in *Anderson*, volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters less interest and less certain of what options they want on the ballot. *See Anderson*, 460 U.S. at 792. The discrepancy between voter desires and voter outcomes was manifest here, where 200,000 Arizonans voiced their intention to vote for Nader in May, *see* Behavior

Research Center of Arizona, *Rocky Mountain Poll*, Released in May of 2004, but the circulator and petition restrictions precluded their voices from being heard in November choices.

To illustrate the contrast, under Arizona's contemporary law, the Republican Party of 1854 decided "too late" to be on the ballot by current standards, although this was not a presidential election year, (July 6, 1854, in response to new laws passed by Congress, the Kansas-Nebraska Act of 1854), *see* William E. Geinapp, *The Origins of the Republican Party*, 104-06 (1987); the Populist Party of 1892, one of the most influential independent political movements in America, decided "too late" (July 5, 1892) to be on the ballot (created in reaction to the Democratic candidate issue choices of 1892), *see* Robert B. Mitchell, *Egad! He Moved His Feet When He Ran: James Weaver, the First to 'Run' in a Presidential Race*, Washington Post, July 5, 2008, p. C01; Teddy Roosevelt, a favorite of Arizona voters, and his Bull Moose Party, decided "too late" to be on the ballot by current standards (June 22, 1912), *see* Patricia O'Toole, *The War of 1912*, Time, June 25, 2006; and Fighting Bob LaFollette, one of the most important alternative Presidential candidates in the 20th century, decided "too late" (July 4, 1924), *see* Charles Lincoln Van Doren and Robert McHenry, *Webster's Guide to American History*, 419 (1971). Those four are four of the most well known outsider Presidential candidates or third party movements in American history.

The state then argues for a "candidate diligence" test (re: candidate wealth); this court has never so limited the right of voters to inclusive ballots on the

timing of a candidate's petition drive. In *Rhodes*, Wallace supporters failed to submit petitions until July, after Arizona's deadline. *See Rhodes*, 393 U.S. at 66, n.7 (Warren, J., *dissenting*). In *Anderson*, Anderson, the candidate, did not submit petitions until April 24, 1980, when it was long well-known Reagan would be the GOP nominee. *Anderson*, 460 U.S. at 782. In neither case did this Court superimpose a "could have" test disguised as "reasonable diligence" as the district court suggested. (Petition, Appendix, p. 6b.)

District courts, following this Court, repeatedly strike down pre-primary deadlines for general election candidates that are twice as long as this court considered permissible in *Anderson*. Indeed, as the Ninth Circuit concluded, this particular deadline did not even meet rational basis review, given the state's only excuse for the law (finding paper for the ballot) was not even "internally consistent." *Nader*, 531 F.3d at 1039. Indeed, Arizona, which employed a September deadline for independent Presidential candidates for a hundred years from 1892 to 1992, never had any problem with finding printing paper for the ballot previously. It was only after such independent candidates won record votes in Arizona in 1992, that the deadline was moved up to early June, which foreclosed independents from the Presidential ballot for the next 12 years.

The excuse proffered by the state and accepted by the district court was that Presidential politics in 2004 had "changed since *Anderson*," noting that most candidates of the major parties were known by March. (Petition, Appendix, p. 12b.) This was error. The New York Times published an article on March 20, 1980

which read in the first paragraph: "President Carter and Ronald Reagan established themselves Tuesday as the likely contenders in next fall's election." Hedrick Smith, *President and Regan Now Appear Likely Contenders in Fall Elections*, New York Times, p. A1 (March 20, 1980). In other words, nothing's changed. Anderson's candidacy was likely a reaction to Reagan's nomination, so it is error to suggest that Anderson or his supporters did not know until later than March who the Republican nominee would be.

As this Court in *Anderson* well understood, the voting marketplace – through which the public introduces ideas and debates policies only according to the candidate choices the states afford them – is what the First Amendment protects: "By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, [ballot access] restrictions threaten to reduce diversity and competition in the **marketplace of ideas.**" *Anderson*, 460 U. S. at 794 (emphasis added).

Ballot deadlines are not a calendar contest; the issue is fact-contingent and state-specific in light of the "whole" of the laws and their effect on similarly situated candidates and voter choice. Court after court has found that extended pre-primary deadlines for a general election ballot are inherently suspect and has struck them down – the relevant factor being the extended pre-primary deadline, not the specific date at issue. Nor has this court ever suggested that the reasonableness of a ballot-access deadline be determined by when the major-party candidates nominations become settled; indeed, Anderson did not announce until after he knew both Reagan and Carter

were the nominees. Consequently, the district court's assertion that because the partisan presidential primaries have moved several months earlier means an early independent candidate deadline is also warranted is erroneous.

Equally, laws which impose durational requirements on the right to participate in the political process have been struck down. *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.") The effect of Arizona's petitioning requirement is that only those registered to vote in June can place a candidate on the ballot, even if they will eligible to vote in November for the same ballot. It is discriminatory since partisan candidates have deadlines between forty days (for partisan presidential primaries) and ninety days (for partisan non-presidential primaries).

Equally, the disparity between Arizona and other states equally weighs against Arizona. A court should also examine how sister states impose burdens to assess severity of restrictions and necessity of restrictions to protect the public. *See Rockefeller v. Powers*, 917 F. Supp. 155, 161 (E.D.N.Y. 1996). Here, again, the comparison exposes the severity of these burdens, as so few states employ such high signature requirements, almost none impose early June deadlines or even July deadlines, and only a minority impose residency bans on circulator speech.

The Supreme Court of Arizona only found the deadline permissible when a party switcher tried to

use the ballot access as way of circumventing internal state party convention recognition, and, therefore, did not apply strict scrutiny. *See Browne v. Bayless*, 202 Ariz. 405, 408-09, 406 P.3d 416, 419-20 (2002). The speech restricted, the number of speakers excluded, and the size of the audience available and likely to hear the speech, are the focus. As the Ninth Circuit noted, the state did not even present an "internally consistent position" and provided "no satisfactory explanation" for the early deadline. *Nader*, 531 F.3d at 1039-40. The state, which does not know until September the number of candidates and initiatives for four hundred different offices, cannot claim the mere presence of an independent candidate is the determinative factor in ordering ballot paper, especially when it never had any problem with "missing ballot paper" for a hundred years of prior presidential election history, most of which included the early voting, Spanish translation, and other requirements of ballots.

Alabama must abide by the same federal laws; its deadline is September 6. Alaska must must abide by the same federal laws; its deadline is August 6. Arkansas must abide by the same federal laws; its deadline is August 4. California must abide by the same federal laws; its deadline is August 8. Connecticut must abide by the same federal laws; its deadline is August 6. The District of Columbia must abide by the same federal laws; its deadline is August 27. Hawaii must abide by the same federal laws; its deadline is September 5. Idaho must abide by the same federal laws; its deadline is August 24. Iowa must abide by the same federal laws; its deadline is August 15. Kansas must abide by the same federal laws; its deadline is August 4. Kentucky must abide

by the same federal laws; its deadline is September 5. Louisiana must abide by the same federal laws; its deadline is September 2. Maine must abide by the same federal laws; its deadline is August 15. Maryland must abide by the same federal laws; its deadline is August 4. Massachusetts must abide by the same federal laws; its deadline is August 26. Minnesota must abide by the same federal laws; its deadline is September 9. Mississippi must abide by the same federal laws; its deadline is September 5. Montana must abide by the same federal laws; its deadline is August 13. Nebraska must abide by the same federal laws; its deadline is September 1. New Hampshire must abide by the same federal laws; its deadline is August 3. New York must abide by the same federal laws; its deadline is August 19. North Dakota must abide by the same federal laws; its deadline is September 5. Ohio must abide by the same federal laws; its deadline is August 21. Oregon must abide by the same federal laws; its deadline is August 26. Pennsylvania must abide by the same federal laws; its deadline is August 1. Rhode Island must abide by the same federal laws; its deadline is September 5. South Dakota must abide by the same federal laws; its deadline is August 5. Tennessee must abide by the same federal laws; its deadline is August 21. Vermont must abide by the same federal laws; its deadline is September 12. Virginia must abide by the same federal laws; its deadline is August 22. Washington must abide by the same federal laws; its deadline is August 2. West Virginia must abide by the same federal laws; its deadline is August 1. Wisconsin must abide by the same federal laws; its deadline is September 2. Wyoming must abide by the same federal laws; its deadline is August 25. Only Texas with a May 8 deadline, Nevada with an April 11

deadline, and Utah with a March 17 deadline, are earlier than Arizona. One state, New Mexico, has an identical deadline. Forty-five states have later deadlines, most employing much later deadlines, as Arizona itself utilized during the civil rights balloting era from 1972 through 1992. The median deadline is August 6, two months later than Arizona. *See* Fed. Election Comm., *2008 Presidential Primary Dates and Candidate Filing Deadlines for Ballot Access*, August 14, 2008.[1]

There is simply no reason why Arizona would require independent candidates to submit ballot-access petitions over two months prior than most other states. As the decision below noted, Arizona's unusual June deadline, a-historical and contrary to most states of the Union, months prior to the primary, could not even stand rational basis review, least of all strict scrutiny.

C. There Is No Uncertainty for Amici States Given Overwhelming Concurrence of Circuits and States Against These Laws.

Few of the amici states, already in the minority in imposing these laws, lack clarity from their respective circuits. The Ninth Circuit has already rendered any non-resident ban on petition circulation invalid in amici states Montana, Alaska, and Idaho, *see Nader v. Brewer*, 531 F.3d 1028; the Tenth Circuit has already invalidated any non-resident ban on petition circulation in amici states Colorado, Oklahoma, Kansas and Wyoming, *see Yes on Term Limits*, 550

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[1] *See* http://www.fec.gov/pubrec/2008pdates.pdf.

F.3d 1023; *see also Chandler*, 292 F.3d 1236; and the Sixth Circuit has already invalidated any non-resident ban on petition circulation in amici states Michigan and Ohio, *see Nader v. Blackwell*, 545 F.3d 459. Amici states Alabama, Florida, and Delaware never faced any uncertainty concerning the constitutionality of a residency ban on presidential petition circulators since these states have no residency ban on petition circulators.

The same applies to the purported lack of clarity on the constitutionality of imposing an extended pre-primary deadline on general election independent candidates for inclusion on the ballot with high signature requirements and extensive petitioning procedures, when the state, in Arizona's case, cannot even provide an "internally consistent" explanation for its laws. *Nader*, 531 F.3d at 1039. Alabama, Alaska, Idaho, New Hampshire, Ohio, South Dakota, and Wyoming all have deadlines after Arizona's.

CONCLUSION

Unless this court seeks to affirm the precedent below and the sister precedents that followed it in multiple Circuits, uniting the Sixth, Seventh, Ninth and Tenth Circuits on the impermissibly broad character of using non-residency as a proxy for fraud when states try to ban all non-residents from the core political speech of Presidential petition circulation in a national election directly impacting all Americans, then no necessary justification for accepting certiorari on that issue persists in this case. Indeed, very few states in the country impose residency bans on circulating petitions; the few that do have resolution in Circuits having already addressed the issue.

The same logic applies to Arizona's early deadline for submission of candidate petitions, a deadline the Ninth Circuit noted could not even pass rational basis review given Arizona's failure to articulate even an "internally consistent" excuse for its early deadline. This court, two decades ago, noted seventy-five days normally sufficed for a general election ballot access deadline for independent candidates for the Presidency and almost every state in the nation concurs. Arizona's current deadline, only imposed in 1993, is more than twice as long – 153 days. This Court, like circuit courts across the country and the overwhelming majority of states, reject deadlines earlier than August, particularly extended pre-primary deadlines.

Dated at Milwaukee, Wisconsin on this the 5th day of February, 2009.

THE BERNHOFT LAW FIRM, S.C.
Attorneys for the Respondents

By: Robert G. Bernhoft
Wis. State Bar No. 1032777
Counsel of Record
Robert E. Barnes
Of Counsel

207 East Buffalo Street, Suite 600
Milwaukee, Wisconsin 53202
(414) 276-3333 telephone
(414) 276-2822 facsimile
rgbernhoft@bernhoftlaw.com

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JANICE BREWER,
in her official capacity as Secretary of State of Arizona,

Petitioner,

vs.

RALPH NADER and DONALD N. DAIEN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

TERRY GODDARD
Attorney General of Arizona
MARY R. O'GRADY*
Solicitor General
BARBARA A. BAILEY
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007-2926
(602) 542-8986

*Counsel of Record

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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The Arizona Secretary of State has requested that this Court grant review in this case to: (1) resolve the split among the lower courts and answer the question expressly left open in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 183 (1999), concerning whether State residency requirements for petition circulators comply with constitutional requirements; and (2) resolve a conflict between the Ninth Circuit and the Arizona Supreme Court concerning the constitutionality of Arizona's deadline by which independent candidates for President must file nomination petitions.

These important issues center on when strict scrutiny applies to the analysis of State election laws. This Court has repeatedly recognized and affirmed that States need flexibility to exercise their responsibility to establish policies governing elections. Because of that need for flexibility, strict scrutiny is generally not appropriate absent a showing that a State law severely burdens the challenger's rights. *See, e.g., Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008). The Ninth Circuit decision invalidating Arizona's filing deadline for independent candidates for President and its prohibition on out-of-state petition circulators does not comport with this Court's election law jurisprudence because it applied a strict scrutiny analysis absent evidence that the State laws in question severely burdened Respondents' constitutional rights. The court's analysis of the residency requirement also fails to recognize the State's compelling interests in requiring petition

circulators to be state residents. This Court should grant review and reverse the Ninth Circuit's decision.

I. This Court Should Review the Ninth Circuit Decision Invalidating Arizona's Residency Requirement for Petition Circulators to Resolve Disagreements Among Lower Courts and Address an Issue That This Court Expressly Left Open in *Buckley v. American Constitutional Law Foundation, Inc.*

Respondents do not dispute the two fundamental reasons Arizona's Secretary of State asks this Court to review the Ninth Circuit decision invalidating Arizona's residency requirement for petition circulators. First, Respondents do not dispute that in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), this Court expressly left open the question of whether a State residency requirement is constitutional. *See Buckley*, 525 U.S. at 197 (noting that residency requirement was not at issue in that case). Second, Respondents do not dispute that, since *Buckley*, the lower courts have reached conflicting decisions regarding state residency requirements.

Although Respondents attempt to minimize the significance of the division among by the lower courts, Respondents do not deny that a conflict exists. In a recent decision on the subject of circulator residency requirements, the Sixth Circuit candidly acknowledged that the circuit courts "have divided as to their

constitutionality." *Nader v. Blackwell*, 545 F.3d 459, 477 (6th Cir. 2008). The Sixth, Seventh, Ninth and Tenth Circuits have applied strict scrutiny and invalidated state residency requirements, but the Eighth Circuit declined to apply strict scrutiny and upheld a state residency requirement as a reasonable regulation to protect the integrity of the petition circulation process. *Compare Nader*, 545 F.3d at 475; *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1028-1031 (10th Cir. 2008); *Nader v. Brewer*, 531 F.3d 1028, 1036 (9th Cir. 2008); *Krislov v. Ridenour*, 226 F.3d 851 (7th Cir. 2000) (applying strict scrutiny and rejecting state residency requirements) *with Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614, 618 (8th Cir. 2001) (declining to apply strict scrutiny and upholding state residency requirement).[1]

State courts and district courts have also reached inconsistent decisions regarding state residency requirements. *Compare Frami v. Ponto*, 255 F. Supp. 2d 962, 970 (W.D. Wis. 2003) (invalidating Wisconsin's residence requirement) *with Idaho Coalition United for Bears v. Cenarrusa*, 234 F. Supp. 2d 1159, 1164 (D. Idaho 2001) (declining to apply strict scrutiny and upholding Idaho residency requirement for

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[1] Respondents incorrectly cite *Perez-Guzman v. Garcia*, 346 F.3d 229 (1st Cir. 2003) as a decision that supports the circuits that have rejected residency requirement for petition circulators. That case invalidated a requirement that attorneys notarize petition signatures for political parties to gain representation on the ballot. The court acknowledged that Puerto Rico's notarization requirement was unique. *Perez-Guzman*, 346 F.3d at 231.

initiative petition circulators); *Hart v. Sec'y of State*, 715 A.2d 165, 167-68 (Me. 1998) (upholding Maine's residency requirement); *Kean v. Clark*, 56 F. Supp. 2d 719, 730-33 (S.D. Miss. 1999) (applying strict scrutiny and upholding Mississippi residency requirement).

In addition, courts invalidating local residency requirements have often recognized that State residency requirements may satisfy constitutional requirements. *See Lerman v. Bd. of Elections*, 232 F.3d 135, 146-50 (2d Cir. 2000) (striking down local residency requirement and noting that state's interest was served by the "less burdensome requirement[ ]" of state residency); *Morrill v. Weaver*, 224 F. Supp. 2d 882, 903 (E.D. Pa. 2002) (rejecting in-district residency requirement but suggesting state interests could be served by state residency requirement); *KZPZ Broadcasting, Inc. v. Black Canyon City Concerned Citizens*, 13 P.3d 772, 778-79 (Ariz. App. 2000) (invalidating local residency requirement but "[a]ssuming, without deciding, that a state residency requirement would be upheld").

These decisions illustrate the confusion among lower courts regarding the appropriate analysis of state residency restrictions for petition circulators. The Ninth Circuit erred in this case by applying strict scrutiny absent any evidence that the State residency requirement burdened Nader or his supporters. This Court's decision in *Buckley* does not require strict scrutiny of every requirement that limits who may circulate petitions. Instead, following the approach in such cases as *Burdick v. Takushi*, 504 U.S. 428

(1992), *Timmons v. Twin Cities Area New Party,* 520 U.S. 351 (1997) and *Anderson v. Celebrezze,* 460 U.S. 780 (1983), courts should analyze the extent to which the State's requirement burdens the challenger's ability to communicate their message or gain access to the ballot. This Court recognized in *Buckley* that "no litmus-paper test will separate valid ballot-access provisions from invalid restrictions." *Buckley*, 525 U.S. at 192 (internal quotations omitted). Challengers should be required to show that a State residency requirement for petition circulators poses a severe burden on their rights in order to trigger strict scrutiny review.

Establishing the correct approach to the analysis of residency requirements for petition circulators is crucial to States which are responsible for protecting the integrity of elections within their jurisdiction. These issues affect a significant number of jurisdictions. Nineteen States and the District of Columbia have residence requirements for petition circulators. *See* Amicus Br. of Montana, et al., at 8. These States have enacted residency requirements as an "integrity-policing matter." *Buckley,* 525 U.S. at 197. Even if this Court determines that a residency requirement must satisfy strict scrutiny review, it should recognize the State's compelling interest in adopting residency requirements for petition circulators to combat election fraud.

In opposing the Petition for Certiorari, Respondents trivialize the role of State policy makers in protecting the integrity of election processes. Respondents

question the need for any regulation of petition circulators at all, assert that the State can subpoena any non-resident if necessary, speculate that requiring out-of-state circulators to agree to service of process within the state might provide adequate protection for a state, and suggest that other anti-fraud mechanisms might be more effective than a prohibition against out-of-state circulators. Resp. Br. at 19-20. Despite Respondents' efforts to minimize the importance of the problem, it is undeniable that petition fraud occurs in Arizona and elsewhere. *See, e.g., Nader,* 545 F.3d at 463-65 (describing Ohio's invalidation of Ralph Nader petition signatures based on signature forgery, failure of circulators to witness signatures, and false residences provided by circulators, among other reasons); Pet. App. A at 20a (disregarding petition fraud in Arizona that was not caused by out-of-state petition circulators); Montana et al., Amicus Br. at 12-15 (describing petition fraud in other states). As explained in the Petition (19-20), lower courts have failed to follow the analysis of anti-fraud measures that this Court applied in *Crawford*, 128 S.Ct. at 1613, 1618-19. This Court's review is necessary to provide direction to lower courts regarding the proper analysis of State residence requirements for petition circulators.

II. The Court Should Review the Ninth Circuit Decision Invalidating Arizona's Filing Deadline for Independent Candidates for President to Resolve a Conflict With the Arizona Supreme Court and Provide Guidance to Lower Courts.

Arizona seeks review of the Ninth Circuit decision invalidating its filing deadline for independent candidates for President because it conflicts with an Arizona Supreme Court decision that upheld the filing deadline and because it does not apply the analytical framework this Court uses to analyze the constitutionality of state election laws.

Although Respondents argue that in *Browne v. Bayless*, 202 Ariz. 405, 406 P.3d 416 (2002), the Arizona Supreme Court found only that the filing deadline was "permissible when a party switcher tried to use the ballot access as a way of circumventing internal state party convention recognition" (Resp. Br. at 30-31), *Browne*'s holding was not limited to those facts. In *Browne*, the Arizona Supreme Court applied this Court's precedent and determined that Arizona's filing deadline for independent candidates satisfied constitutional requirements. *Browne*, 46 P.3d at 419. The Ninth Circuit, applying the same precedent to the same state law, reached the opposite conclusion. As a result, there is a conflict that this Court should resolve.

Respondents incorrectly assert that the Petition "misstates critical facts found by the Ninth Circuit." Resp. Br. at 25. Specifically, Respondents suggest that

the Petition wrongly claims that Respondents failed to establish that the June filing deadline imposed any burden on their First Amendment rights, and they note that the Ninth Circuit recognized that no independent presidential candidates had qualified for the ballot in Arizona since the State moved the filing deadline to June. *Id.* The Petition's statement regarding the lack of evidence in this case is accurate. Respondents presented no evidence that showed that the filing deadline was in any way a barrier to qualifying for the ballot in Arizona. There was, however, evidence that the Nader campaign failed to make any reasonable effort to secure the necessary petition signatures in Arizona. (Pet. at 25; App. B at 12b-13b.) The Ninth Circuit's concern about the failure of independent candidates for President to qualify for the ballot in Arizona since the change in the filing deadline in 1993 was unwarranted. The 2004 election was only the third presidential election since Arizona changed its filing deadline in 1993. And, in the 2008 election cycle, Ralph Nader successfully qualified as an independent candidate for president.

Respondents also incorrectly argue that strict scrutiny is appropriate when analyzing filing deadlines because independents are "insular unrepresented minorities." Resp. Br. at 25. To the contrary, in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), this Court carefully analyzed "the character and magnitude of the asserted injury" when determining the appropriate level of scrutiny. *Anderson*, 460 U.S. at 789. The Court recognized that regulation

is necessary if elections "are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* at 788 (internal quotations omitted). This Court has never held that independent voters are a protected class and that any laws affecting them are subject to heightened scrutiny.

Respondents' brief in opposition argues without support that Arizona's filing deadline is an effort to limit voter choice and criticizes Arizona's signature requirements for independent candidates. Resp. Br. at 22-23, 25. But in defending the Ninth Circuit's decision Respondents offer no coherent principles for analyzing state filing deadlines. They assert that in *Anderson*, this Court "expressly found that seventy-five days should give the Secretary of State adequate time to prepare and print the general election ballot." Resp. Br. at 23. But, *Anderson* adopted no such bright-line rule. They also argue that "[m]ost states have August or later deadlines" and that "[t]he primary fixes the true deadline the state needs for printing ballots." Resp. Br. at 24. They also assert that the June filing deadline is a severe burden "because it pre-dates the conventions by months, during the 'dead' period of presidential politics." *Id.* at 26. They never assess the burdens of Arizona's filing deadline on independent candidates based on evidence or measure the State's evidence regarding its legitimate interests in an orderly election. The Ninth Circuit decision in this case suffered the same deficiencies. The Ninth Circuit observed that *Anderson*,

which rejected a March filing deadline, "remains binding Supreme Court authority," but it failed to apply the analysis that *Anderson* required.

In sum, the Ninth Circuit decision conflicts with an Arizona Supreme Court decision and contradicts the principles of *Anderson* and its progeny. Review should be granted to provide guidance to the lower courts regarding the proper analysis of candidate filing deadlines.

CONCLUSION

For the reasons set forth above and in the Petition, the Arizona Secretary of State requests that this Court grant the petition for writ of certiorari in this case.

Respectfully submitted,

TERRY GODDARD
Attorney General of Arizona
MARY O'GRADY
Solicitor General
BARBARA A. BAILEY
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007-2997

Counsel for Petitioners

115

(2)

No. 08-648

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In The Supreme Court of the United States

JANICE BREWER,
in her official capacity as Secretary
of State of Arizona,

Petitioner,

v.

RALPH NADER and DONALD N. DAIEN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE STATES OF MONTANA, ALABAMA, ALASKA, COLORADO, DELAWARE, FLORIDA, IDAHO, MICHIGAN, NEW HAMPSHIRE, OHIO, OKLAHOMA, SOUTH DAKOTA AND WYOMING IN SUPPORT OF PETITIONER

MIKE MCGRATH
Attorney General of Montana
ANTHONY JOHNSTONE
Solicitor
State Bar ID No. 7230
Counsel of Record
State of Montana
Justice Building
215 North Sanders
P.O. Box 201401
Helena, Montana 59620-1401
(406) 444-2026

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Attorney General
TROY KING
Office of the Alabama
Attorney General
500 Dexter Avenue
Montgomery, Alabama 36130

TALIS J. COLBERG
Attorney General of Alaska
P.O. Box 110300
Juneau, Alaska 99811

JOHN W. SUTHERS
Colorado Attorney General
State of Colorado
1525 Sherman Street,
Seventh Floor
Denver, Colorado 80203

RICHARD S. GEBELEIN
Chief Deputy
Attorney General
Delaware Department
of Justice
820 N. French Street
Wilmington, Delaware 19801

Attorney General
BILL MCCOLLUM
Office of the Florida
Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050

LAWRENCE WADSEN
Idaho Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010

MICHAEL A. COX
Michigan Attorney General
P.O. Box 30212
Lansing, Michigan 48909

KELLY A. AYOTTE
Attorney General of
New Hampshire
33 Capitol Street
Concord, New Hampshire
03301

NANCY H. ROGERS
Attorney General of Ohio
30 East Broad Street,
17th Floor
Columbus, Ohio 43215

W. A. DREW EDMONDSON
Attorney General
of Oklahoma
313 N.E. 21st Street
Oklahoma City, Oklahoma
73105-4894

LAWRENCE E. LONG
Attorney General of
South Dakota
1302 E. Hwy. 14, Suite 1
Pierre, South Dakota
57501-8501

BRUCE A. SALZBURG
Wyoming Attorney General
123 State Capitol
Cheyenne, Wyoming 82002

QUESTIONS PRESENTED

1. Whether a state residence requirement for petition circulators imposes a severe burden on political rights under the First and Fourteenth Amendments that cannot be justified by a State's interests in protecting the integrity of the petition process.

2. Whether a pre-primary filing deadline for independent candidates imposes a severe burden on political rights under the First and Fourteenth Amendments that cannot be justified by a State's interests in protecting the integrity of the petition process.

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INTEREST OF THE *AMICI CURIAE*[1]

This case asks whether state laws enacted to protect the integrity of the petition process are subject to strict scrutiny and invalidation under the First and Fourteenth Amendments. *Amici* States, like the Petitioner, require compliance with reasonable, nondiscriminatory regulations on petitioning and other electoral processes to vindicate constitutionally sufficient administrative interests. While safeguarding the petition process, state election administrators also must comply with an increasing number of election reform measures at the federal and state level, all within a calendar shortened by early voting. Due to the crucial role states play in ensuring fair and reliable elections in these changing circumstances, and the fundamental importance of electoral participants and the calendar to such elections, *Amici* States seek the resolution of both questions presented.

STATEMENT OF THE CASE

1. Arizona allows nomination of independent candidates for president and statewide public office through petition by 3 percent of the number of

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief.

unaffiliated registered voters in the state. *See* Ariz. Rev. Stat. § 16-341(E). An independent candidate may begin collecting signatures for the petition at any time, but must file the petition between 90 and 120 days before the primary election, the same deadline set for party primary candidate nominations and presidential elector appointments. *See* Ariz. Rev. Stat. §§ 341(C), 16-311(A), 16-344(A). Only registered voters may sign petitions, but signatures may be witnessed and verified by any person qualified to register to vote. *See* Ariz. Rev. Stat. § 16-321(B), § 16-321(D). One of the qualifications to register to vote is residency in the State. *See* Ariz. Rev. Stat. § 16-101(A). Under these ballot-access laws, several independent candidates have gained ballot access. Pet. App. 22a.

2. Respondent Ralph Nader announced his independent candidacy for President of the United States on February 22, 2004. Pet. App. 12b.

a. Under the filing deadline, Mr. Nader had 107 days following his announcement to collect 14,694 signatures before June 9. Pet. App. 1b, 3b, 12b. Under the residency requirement, Mr. Nader could draw upon a pool of approximately 3.7 million eligible Arizona residents for his petition circulators. Pet. App. 9b. On June 9, he filed nomination petitions containing approximately 21,185 signatures, more than 90 percent of which were collected in the two weeks immediately preceding the deadline. Pet. App. 13b.

b. Within ten days after the petition filing deadline, two voters brought an action in state court to challenge a number of signatures on Mr. Nader's petitions. Pet. App. 1b-2b. The challenge cited several grounds for petition fraud, including signature forgeries by circulators and falsified addresses, in addition to other violations of state law. Pet. App. 2b. At the time set for trial, Mr. Nader announced he would withdraw his petitions and his candidacy, and the state court entered judgment enjoining the State and county election officials from placing Nader and his electors on the ballot. *Id.*

3. After withdrawing his candidacy, Mr. Nader filed this action in federal district court, seeking a preliminary injunction placing his name on the ballot and declaratory relief that the residence requirement and filing deadline are unconstitutional. Pet. App. 2b. The district court denied the application for a preliminary injunction. Pet. App. 2b. The Ninth Circuit affirmed the denial. *See Nader v. Brewer*, 386 F.3d 1168 (9th Cir. 2004).

a. Subsequently, the district court granted the State's motion for summary judgment on an undisputed record. Pet. App. 13b. The district court initially noted that "Plaintiffs offered no evidence to establish the significance of the burden imposed on them by the challenged statutes." Pet. App. 2b n.1. The district court then upheld the residence requirement as necessary to protect "the petition process from fraud and abuse, and to ensure the State's subpoena power in order to accomplish these goals."

Pet. App. 9b. The district court also upheld the filing deadline as necessary to support the State's interests "in allowing sufficient time to verify signatures, allow for challenges to petitions, and to print and distribute ballots for early and overse[a]s voting." Pet. App. 13b.

b. The Ninth Circuit reversed. Pet. App. 1a-26a. In striking down both the residence requirement and the filing deadline, the court relied upon what it considered to be "[c]ontrolling Supreme Court authority." Pet. App. 3a. First, the court held that the requirement "creates a severe burden on Nader and his out-of-state supporters' speech, voting and associational rights," and therefore, strict scrutiny is "mandated by the Supreme Court in *Buckley* [*v. American Constitutional Law Found.*, 525 U.S. 182, 194-95 (1999)]." Pet. App. 16a. Second, the court held that "the Arizona deadline imposes a severe burden on plaintiffs' rights" also warranting strict scrutiny, citing *Anderson v. Celebrezze*, 460 U.S. 780, 792, 795, 806 (1983).

The court concluded with the observation that "[t]he historical background for [election cases] changes rapidly," and that ballot-access challenges "have proved difficult for courts to evaluate." Pet. App. 26a. Notwithstanding this difficulty and the absence of evidence to establish any burden imposed by the ballot-access laws at issue, the court held that

the State did not "meet the heavy burden . . . that it must shoulder" under strict scrutiny. Pet. App. 26a.

REASONS FOR GRANTING THE WRIT

The petition for certiorari in this case should be granted on both questions. State and federal courts are divided over the constitutionality of two critical safeguards widely enacted by states to protect the integrity of their petition and electoral processes: first, residence requirements that help ensure local involvement and legal compliance by frontline petition circulators; and second, filing deadlines that provide election officials and courts the time to review the petition process and remedy fraud or other challenged defects.

As Arizona's petition explains and the decision below acknowledges, judicial review of these laws is fraught with conflicting standards for assessing the laws' burdens and justifications under this Court's precedents. Pet. App. 26a. Indeed, this Court's most recent direct authority on these issues left the question of residence requirements unanswered, *see Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 197 (1999) (assuming the constitutionality of a residence requirement), while members of this Court questioned the applicable standard of review more generally. *See id.* at 206 (Thomas, J., concurring in the judgment); *id.* at 227-28 (Rehnquist, C.J., dissenting); *id.* at 215-16 (O'Connor, J., joined by Breyer,

J., concurring in the judgment in part and dissenting in part). The Ninth Circuit's decision conflicts directly with other circuit and state supreme courts on both questions. *See, e.g.*, *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614 (8th Cir. 2001) (upholding circulator state residence requirement); *Browne v. Bayless*, 46 P.3d 416 (Ariz. 2002), *cert. denied*, 537 U.S. 1088 (upholding same petition filing deadline).

These conflicts impede states' efforts to govern the rapidly changing landscape of the petition and election process. Candidates start, and early voting ends, the electoral cycle earlier than ever. The professionalization of petition circulation has enabled more effective petition drives but also intensifies incentives for fraud and short-cuts in the signature-gathering process. Meanwhile, the number of election challenge cases has more than doubled since *Buckley*, increasing the resource demands on already strained state election administration systems. *See* Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 Stan. L. Rev. 1, 29 (2007). Resolution of the questions presented will allow states to calibrate their procedural safeguards and election calendars to respond to these and future developments.

I. STATE RESIDENCE REQUIREMENT

In *Buckley*, this Court considered the constitutionality of Colorado's laws regulating the petition process. While "[p]etition circulation . . . is core political speech, because it involves interactive

communication concerning political change," this Court also recognized "that there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Buckley*, 525 U.S. at 186-87 (citations and quotations omitted). The Court balanced these competing interests in considering a state residence requirement. "[A]ssuming that a residence requirement would be upheld as a needful integrity-policing matter," this Court held that "the added registration requirement is not warranted." *Id.* at 197.

As the Court observed at the outset of its analysis, "our judgment is informed by other means Colorado employs to accomplish its regulatory purposes." *Id.* at 192. One of these "other means" was the residence requirement. *See id.* at 230 (Rehnquist, C.J., dissenting) ("I would not quarrel" with a holding "that a State may limit petition circulation to its own residents"); *id.* at 217 (O'Connor, J., joined by Breyer, J., concurring in the judgment in part and dissenting in part) ("I believe that the requirement that initiative petition circulators be registered voters is a permissible regulation of the electoral process.") (citation omitted); *id.* at 211 (Thomas, J., concurring in the judgment) (assuming "the State has a compelling interest in ensuring that all circulators are residents," and agreeing that "the State's asserted interest could be more precisely achieved through a residency requirement.").

Since *Buckley*, lower courts have taken divergent paths from the Court's guidance on state residence requirements. At the same time, the predicate for residence requirements has been reinforced by a proliferation of fraud and related defects in the petition process.

1. The Ninth Circuit's invalidation of the state residence requirement deepens a federal circuit and state supreme court split on a recurring issue. The primary division lies between courts that read *Buckley* to support state residence requirements as less burdensome alternatives to disfavored voter registration requirements, and courts that extend *Buckley* to invalidate state residence requirements as severely burdensome. Nineteen states and the District of Columbia have adopted state residence requirements for petition circulators.[2]

a. The Eighth Circuit upheld a residency requirement for ballot initiatives by applying this Court's "sliding standard of review" depending on the

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[2] Alaska Stat. § 15.45.105; Ariz. Rev. Stat. §§ 16-321(D), 19-114; Cal. Elections Code §§ 102, 8451, 8066, 9021; Colo. Rev. Stat. §§ 1-4-905, 1-40-112(1); Conn. Gen. Stat. § 9-453e; D.C. Code § 1-1001.16(h)(5); Idaho Code § 34-1807; Kan. Stat. Ann. § 25-303; Me. Const. Art. IV, Pt. 3, § 20; Mich. Comp. Laws § 168.544(c); Miss. Const. Art. 15, § 273(12); Mo. Rev. Stat. § 115.325(2); Mont. Code Ann. § 13-27-102(2)(a); Neb. Rev. Stat. Ann. § 32-629(2); N.D. Const. Art. III, § 2; N.D.C.C. § 16.1-01-09(3), § 3; Ohio Rev. Code § 3503.06; Okla. Stat. tit. 34, § 3.1; Pa. Stat. Ann. tit. 25 § 2911(d); S.D. Cod. L. § 12-1-3 (9); Wyo. Stat. § 22-24-107(a).

severity of burden imposed. *Initiative & Referendum Inst. v. Jaeger* at 616 (8th Cir. 2001), *citing Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997). North Dakota presented a hybrid situation where petition circulation is limited to "qualified electors," but all residents over 18 years of age qualify as electors, a significant difference from the Colorado law in *Buckley*. *Jaeger*, 241 F.3d at 616-17. Moreover, the court observed that "many alternative means remain to non-residents who wish to communicate their views on initiative measures," including campaigning and direct communication to voters on particular measures, training residents on the issues and petition circulation, and accompanying circulators. *Id.*

Several more courts, led by the Second Circuit, have relied on *Buckley*'s assumption that state residence requirements are constitutional to invalidate more restrictive local residence or registration requirements. In *Lerman v. Board of Elections*, 232 F.3d 135 (2d Cir. 2000), the court invalidated a local residence requirement partly because "the state's purpose is already served" by a state residence requirement. *Id.* at 150.

The Supreme Judicial Court of Maine reached the same result as the Eighth Circuit under strict scrutiny, holding that any burden "is justified by the State's compelling state interest in protecting the integrity of the initiative process, and the residency requirement set forth in the Maine Constitution is narrowly tailored to serve that interest." *Hart v. Secretary of State*, 715 A.2d 165, 168 (Me. 1998).

Although that case was decided pre-*Buckley*, a federal district court rejected a post-*Buckley* challenge to Maine's residence requirement, *Initiative & Referendum Inst. v. Secretary of State*, 1999 U.S. Dist. LEXIS 22071, *50-51 (D. Me. Apr. 23, 1999), and the state supreme court declined to reconsider *Hart*, *Taxpayers Action Network v. Secretary of State*, 795 A.2d 75, 78 (Me. 2002).

Since *Buckley*, at least three other federal courts, including a district within the Ninth Circuit, have followed *Hart* or *Jaeger* in upholding residence requirements. *See Yes on Term Limits v. Savage*, 2007 U.S. Dist. LEXIS 66432, *32-33 (W.D. Okla. Sept. 7, 2007) (applying strict scrutiny, holding "the residency requirement is narrowly tailored to serve Oklahoma's compelling interest in preserving the integrity of the petition process and policing that process"); *Idaho Coalition United for Bears v. Cenarrusa*, 234 F. Supp. 2d 1159, 1164 (D. Idaho 2001) (applying lesser scrutiny, holding a residence requirement for ballot initiative petition circulators "passes muster under the reasonableness test" because "[n]on-residents are still free to speak to voters regarding particular measures and may train residents on the best way to collect signatures."); *Kean v. Clark*, 56 F. Supp. 2d 719, 733 (S.D. Miss. 1999) (applying strict scrutiny, holding a residence requirement "is constitutional because it is narrowly tailored to the aim of preventing campaign fraud.").

b. The Ninth Circuit reached the opposite conclusion in this case, which it believed "to be mandated by the Supreme Court in *Buckley*." Pet. App.

16a. While the court acknowledged conflicting authority in passing, Pet. App. 18a (*citing Jaeger*) & 19a (*citing Kean*), it relied on the Seventh Circuit's invalidation of a *district voter registration* requirement. Pet. App. 17a, *citing Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000). In fact, Krislov complained that the registration requirement "prevented him from using large numbers of non-registered *residents* to circulate his petitions." *Id.* at 857 (emphasis added). Still, like the Ninth Circuit, the Seventh Circuit held (without direct citation to *Buckley* itself) that "the First and Fourteenth Amendments compel States to allow their candidates . . . to utilize non-residents to speak on their behalf in soliciting signatures for ballot access petitions." *Id.* at 866; *see also Frami v. Ponto*, 255 F. Supp. 2d 962, 970 (W.D. Wis. 2003) (invalidating Wisconsin's residence requirement); *but see Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004) (conservatively estimating circulators necessary to qualify as a presidential candidate in Illinois, noting that "[i]f Nader could not recruit 100 canvassers in Illinois, his electoral prospects were dismal indeed.").

The decision below also relies on a Tenth Circuit local residence requirement case. Pet. App. 16a, *citing Chandler v. City of Arvada*, 292 F.3d 1236 (10th Cir. 2002). In *Chandler*, however, the court noted that "speculation about whether a state residency requirement would be constitutional . . . misses the point." *Id.* at 1244; *see also Yes on Term Limits*, 2007 U.S. Dist. LEXIS 66432, *28 n.20 (W.D. Okla. Sept. 7, 2007) (upholding state residency requirement, noting

that "the Court in *Chandler* took pains to distinguish the municipal residency requirement at issue in that case from a state residency requirement.").

Since the Ninth Circuit decided the case below, the Sixth Circuit has joined the circuit split on state residence requirements. *See Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008) ("Blackwell violated Nader's right to use petition circulators who were not Ohio residents and registered Ohio voters."), *citing Nader v. Brewer*, 531 F.3d 1028, 1036 (9th Cir. 2008). Noting "the split among the circuit courts," however, the Court held that the unconstitutionality of state residence requirements had not been clearly established for qualified immunity purposes. *Blackwell*, 545 F.3d at 477.

2. Residence requirements are common and increasingly important safeguards of the integrity of state petition processes. Although Arizona cited its history of circulator fraud and the administrative necessity of identifying, locating, and haling circulators into court on short notice, Pet. App. 8b, the Ninth Circuit dismissed these justifications because it did not see a link between redressing fraud and non-resident circulators, Pet. App. 20a. To the contrary, states have an important – and compelling – interest in enacting state residence requirements to protect the integrity of the petition process.

a. Months after the district court decision in this case, the Oklahoma Supreme Court explained that "the integrity of the initiative process in many ways hinges on the trustworthiness and veracity of the circulator" because "the Secretary and this Court have no ability to ascertain whether a particular voter actually signed a petition." *In re Initiative Petition No. 379*, 155 P.3d 32, 42 (Okla. 2006). Therefore, "residency requirements ensure that when such issues arise, the circulators will be Oklahoma residents who may be located within state lines and be subject to service for appearance in Oklahoma Courts." *Id.*

The Oklahoma court spoke from experience. It found "overwhelming evidence" of "involvement of out-of-state circulators in the signature gathering process establishing a pervasive pattern of wrongdoing and fraud." *Id.* at 34. There was "no way to determine with any sort of accuracy exactly how many signatures were collected by these out-of state residents as the petition supporters did everything possible to avoid discovery." *Id.* at 50. As a result, the court concluded that "if we do not take the opportunity to address the issue of the effect of out-of-state intrusions into a process reserved to bona fide residents of the State of Oklahoma, the problem will only grow and will present itself as a part of essentially every citizen circulation." *Id*; *cf. Operation King's Dream v. Connerly*, 501 F.3d 584, 591 (6th Cir. 2007) (rejecting federal voting rights claims in absence of state action, when "[b]y all accounts, Proposal 2 found

its way on the ballot through methods that undermine the integrity and fairness of our democratic processes.").

b. The Ninth Circuit, following the Seventh and Tenth Circuits, suggested that states could meet the compelling interest in preventing fraud by "requiring petition circulators to agree to submit to jurisdiction for purposes of subpoena enforcement." Pet. App. 19a, *citing Chandler*, 292 F.3d at 1242-44 *and Krislov*, 226 F.3d at 866 n.7. Yet as the Oklahoma case shows, enforceable regulation depends on the basic accountability conferred by residence. The federal court reviewing Oklahoma's statute cataloged the futile attempts to assert jurisdiction of circulators and related parties in its signature challenge. *Yes on Term Limits, Inc.*, 2007 U.S. Dist. LEXIS 66432, *23-24. Trial evidence in the underlying case indicated that at least one circulator had violated the laws of four states in a single election cycle, including Oklahoma, Colorado, Missouri, and Montana. *Id.* at *19-22.

As the federal court observed, "Oklahoma's experience highlights the difficulties of policing its initiative process when non-resident circulators are used." *Id.* at *26-27. Because states must operate within an ever-narrowing window for processing petitions and printing ballots, *see* Part II below, petition challenges must be brought and litigated within strict timelines and reviewed "with dispatch." *Id.* at *27, *citing* Okla. Stat. tit. 34, § 8(E). "There is thus little time to locate and depose out-of-state circulators, particularly when [as in the instant case]

the circulators give false addresses," and "no ability to compel the presence of out-of-state witnesses at any hearing." *Id.* Given this reality, the Ninth, Seventh, and Tenth Circuit's suggestion of consent to jurisdiction is untenable. *Id.* at *29.

c. The risk of petition fraud by non-resident circulators also disenfranchises voters "who have a right to rely on the integrity of the process." *Id.* This interest goes beyond security from fraud, and includes a voter's – as well as a candidate's or initiative proponent's – reasonable expectation that any challenge to the petition process will be resolved based on facts rather than negative inferences drawn from a circulator's unavailability as a witness. Where circulators cannot be located in response to petition challenges, courts must resort to potentially sweeping petition invalidations even when the extent of fraud may be limited.

For example, in a Montana challenge to more than 64,000 signatures collected by non-resident petition circulators who had used false addresses and "bait and switch" tactics, neither the challengers nor the proponents were able to locate the suspect circulators or present them as witnesses at the challenge hearing. *See Montanans for Justice v. Montana*, 146 P.3d 759, 774 (Mont. 2006). Although the proponents sought more time for discovery, the court explained the need for "rapid action by the parties and the courts between the time an initiative qualifies for the ballot – typically in mid-July – and the date on which

voters cast ballots in the first week of November." *Id.* at 767.

Based on the testimony from fewer than a dozen voters, and the proponents' failure to present a single circulator witness to rebut or limit the fraud allegations, the Montana Supreme Court invalidated all signatures gathered by non-residents, "[a]s it was impossible to precisely identify which certified signatures were untainted by Proponents' signature gatherers' various deceptive practices." *Id.* at 776; *see also Jaeger*, 241 F.3d at 616 (citing an invalidation of over 17,000 signatures when "[t]wo Utah residents who were involved in petition irregularities left the State, and the matter was never fully resolved."); *Initiative Petition No. 379*, 155 P.3d at 34, 49 (invalidating 57,000 signatures based on negative inferences because "[t]here is no way to determine with any sort of accuracy exactly how many signatures were collected by these out-of-state residents."). The next year, in response to *Montanans for Justice*, the Montana Legislature enacted a residency requirement for petition circulators. 2007 Mont. Laws Ch. 481, § 5, *codified at* Mont. Code Ann. § 13-27-102(2).

II. PETITION FILING DEADLINE

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), this Court cautioned that "[c]onstitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus paper test' that will separate valid from invalid restrictions." *Id.* at 489.

Instead, a court "must first consider the character and magnitude of the asserted injury." *Id.*; *see also Williams v. Rhodes*, 393 U.S. 23, 34 (1968) (considering whether "the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights"). To do otherwise and "require that the regulation be narrowly tailored to advance a compelling state interest, . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

In *Anderson*, this Court began its analysis by considering the contemporary political calendar in 1980. At the time of Ohio's March deadline, "developments in campaigns for the major-party nominations have only begun." *Id.*, 460 U.S. at 790-91. The Court highlighted the 1968 Democratic Primary, when President Johnson withdrew on March 31 and Robert F. Kennedy was assassinated on June 5. *Id.* at 790 n.11. It also observed at the time "that campaign spending and voter education occur largely during the month before an election." *Id.* at 797, *quoting Dunn v. Blumstein*, 405 U.S. 330, 358 (1972).

Based upon the spring opening to the primary season in 1968, a tragic change in the field of candidates, and a compressed general election campaign in the fall, the Court found that an independent candidate was burdened by a March filing deadline when "[v]olunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in

the campaign." *Anderson*, 460 U.S. at 792. The Court weighed this finding against the State's administrative interests, agreeing that "[s]eventy-five days appears to be a reasonable time for processing the documents submitted by candidates and preparing the ballot" for party primaries, but finding no similar administrative need "to allow petition signatures to be counted and verified or to permit November general election ballots to be printed." *Id.* at 800.

Anderson was neither the first nor the last word from this Court on petition deadlines. In *Jenness v. Fortson*, 403 U.S. 431 (1971), this Court rejected a challenge to Georgia's petition requirements, noting that the second Wednesday in June was not "an unreasonably early filing deadline for candidates not endorsed by established parties." *Id.* at 438. In *Burdick v. Takushi*, 504 U.S. 428, 436 (1992), this Court approved ballot access laws that included a requirement for minor parties to petition 150 days before the September primary. As this Court has noted, "some cutoff period is necessary for the Secretary of State to verify the validity of signatures on the petitions, to print the ballots, and, if necessary, to litigate any challenges." *American Party of Tex. v. White*, 415 U.S. 767, 787 (1974).

Since *Anderson*, modern political campaigns have expanded rather than compressed the political calendar, and federal election mandates, early voting, and election litigation have increased. Now, despite these developments, lower courts effectively have resorted to a date-based "litmus-paper test" *Anderson*

cautioned against. The result has been a mixture of rigid rules applied to States that struggle to balance changing administrative demands against uncertain constitutional requirements.

1. The Ninth Circuit's invalidation of the June filing deadline contradicts the Arizona Supreme Court's holding on the identical issue. *Amici* States are aware of no other circuit court that has struck down such a late deadline on *Anderson* grounds. Twenty-five states have independent candidate petition filing deadlines in June or earlier.[3]

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[3] See Ala. Code § 17-9-3(a) (June, day of primary); Ariz. Rev. Stat. § 16-341(C); Ark. Code Ann. § 7-7-103(b) (May 1); Colo. Rev. Stat. Ann. § 1-4-303(1) (June, 140 days before general); Fla. Stat. §§ 99.061, -.0955 (May, 120 days before primary); Idaho Code Ann. §§ 34-708, -709 (March, 10th Friday before primary); 10 Ill. Comp. Stat. 5/10-6 (June, 134 days before general); Ind. Code Ann. § 3-8-6-10 (June 30); Me. Rev. Stat. Ann. tit. 21A § 354.7.B (May 27); Miss. Code Ann. § 23-15-785(2) (January, 60 days before primary); Mont. Code Ann § 13-10-503 (March, 82 days before primary); Nev. Admin. Code § 293.200 (April, 25 working days before third Monday in May); N.J. Stat. Ann. § 19:13-9 (June, day of primary); N.M. Stat. § 1-8-52.B (June, day of primary); N.C. Gen. Stat. §§ 163-122(1), -208 (June, 15 days before last Friday in June); Ohio Rev. Code Ann. § 3513.257 (March, day before primary); Okla. Stat. tit. 26 § 5-110 (first Wednesday in June); Pa. Stat. Ann. tit. 25 § 2913(c) (second Friday after April primary); S.D. Codified Laws §§ 12-7-1, -1.1 (June, first Tuesday after first Monday); Tenn. Code Ann. § 2-5-101(a)(1) (first Thursday in April); Tex. Elec. Code Ann. § 142.006 (May, 75th day after primary); Utah Code Ann. § 20A-9-503(1)(a) (March 17); Va. Code Ann. § 24.2-507 (second Tuesday in June); Wash. Rev. Code Ann. § 29A.24.050 (Friday after first Monday in June); W. Va. Code Ann. § 3-5-24 (May, day before primary).

a. In *Browne v. Bayless*, 46 P.3d 416 (2002), the Arizona Supreme Court upheld the same deadline at issue here. The court recognized important differences between the Ohio pre-primary filing date in *Anderson* and Arizona's filing date, including that a later filing date and early voting narrowed the effective period between the deadline and the election. *Id.* at 419. The court also observed that "the national political process has evolved toward a system of ever-earlier presidential primary elections with the result that, by the middle of June in an election year, the identities and positions of the major party candidates have largely been determined." *Id.* Given the changed electoral calendar, the court held candidates faced a lesser burden than in *Anderson*. *Id.* at 420. The State's need "to complete election challenge proceedings and then prepare and print the final ballot" justified that burden. *Id.*, 46 P.3d at 420. The district court in this case applied similar reasoning, acknowledging *Browne*. Pet. App. 13b n.4.

Additionally, other circuits have upheld candidate filing deadlines in June, May, and as early as March. *See Wood v. Meadows*, 207 F.3d 708, 713-14 (4th Cir. 2000) (second Tuesday in June); *Texas Indep. Party v. Kirk*, 84 F.3d 178, 185 (5th Cir. 1996) (May 12 deadline); *Lawrence v. Blackwell*, 430 F.3d 368, 375 (6th Cir. 2005) (March 1); *Cartwright v. Barnes*, 304 F.3d 1138, 1141 (11th Cir. 2002) (rejecting renewed challenge to June deadline at issue in *Jenness*); *Rainbow Coalition of Oklahoma v. Oklahoma State Election Bd.*, 844 F.2d 740, 747 (10th Cir. 1988)

(May 31); *see also Coalition for Free & Open Elections v. McElderry*, 48 F.3d 493, 498 (10th Cir. 1995) (July 15 deadline for independent candidates and the May 31 deadline for party candidates "impose only reasonable burdens").

b. The Ninth Circuit, however, did not address *Browne* or these other cases in its decision. Instead, it found that "Nader's predicament is like that of the plaintiff in *Anderson*." Pet. App. 23a-24a. In so doing, the court treated Arizona's June deadline the same as significantly earlier deadlines invalidated by other circuits. *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 582 (6th Cir. 2006) (November 3 of previous year); *Lee v. Keith,* 463 F.3d 763 (7th Cir. 2006) (December of previous year); *Council of Alternative Political Parties v. Hooks,* 121 F.3d 876 (3d Cir. 1997) (April 10); *New Alliance Party v. Hand,* 933 F.2d 1568 (11th Cir. 1991) (April 6); *cf. Cromer v. South Carolina,* 917 F.2d 819 (4th Cir. 1990) (deadline for filing statement of candidacy 200 days before general election); *but see id.* at 826 (Wilkinson, C.J., dissenting). Prior to *Anderson*, the Eighth Circuit once invalidated a June 1 petition deadline. *See McLain v. Meier*, 637 F.2d 1159, 1164 (8th Cir. 1980).

The only similarity between the decision below and most of the other cases invalidating earlier petition deadlines is that Arizona's deadline occurs before its primary election. Here, the June 9 deadline is 90 days before a September 7 primary, but still four months after Arizona's presidential preference election and after the field of major party

candidates had been settled. As the Seventh Circuit observed about the same election, "[l]ong before the June deadline it was not only certain who the major parties' candidates would be but their positions were well known, the candidates were campaigning vigorously, there was a high level of public interest in the campaign, [and] Nader himself had been campaigning since February. . . . " *Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004). Still, explaining that "*Anderson* remains binding Supreme Court authority," the court refused to consider recent changes in the political calendar despite *Anderson*'s requirement that courts do exactly that. Pet. App. 22a.

2. As a consequence of the Ninth Circuit's strict scrutiny of Arizona's petition deadlines, it invalidated a key component of Arizona's and other states' integrated election calendars based on the State's ability to print ballots on a shorter timeline. Pet. App. 25a. Yet states no longer have the luxury of scheduling election calendars solely around printing ballots by the first Tuesday in November. As the Arizona Supreme Court and others have recognized, modern election calendars must accommodate the time "necessary to administer recounts, to enable judicial resolution of election challenges on the basis of fraud, to print ballots, and to mail out and receive absentee ballots." *Rainbow Coalition of Oklahoma*, 844 F.2d at 745. These processes have lengthened the election calendar since *Anderson*.

a. More than three decades ago, before the widespread adoption of early voting, this Court recognized that election administration goes beyond ballot printing; the calendar must also include time for verifying signatures and litigating challenges. *See American Party v. White*, 415 U.S. 767, 787 n.18 (1974). This process "requires pushing back the deadline for submitting petitions by increasing the amount of time required to determine whether the candidate has obtained the requisite number of valid petitions." *Keith*, 385 F.3d at 735.

As the Arizona Supreme Court explained, expediting statutes are no guarantee of expedited resolutions of petition challenges. *See Browne*, 46 P.3d at 420 ("we can take judicial notice of our own records to find that these cases do not always reach this court within [the statutory review period of] 25 days, and that ample time for a 'prompt' decision often means more than a few days."). Oklahoma's petition challenge was resolved by August 31, 2006, but only after a petition filing deadline of December 19, 2005. *In re Initiative Petition No. 379*, 155 P.3d at 35. In *Montanans for Justice*, a challenge filed August 16, 2006 was not decided by the trial and appellate courts until one week before Election Day, despite Montana's relatively late petition filing deadline of June 23. *Id.*, 146 P.3d at 764-65. By that time, most of the early, overseas and military absentee voters had cast ballots.

b. While litigation has extended the election calendar, early voting and other reforms have moved up the start of the election. Although the Arizona Supreme Court recognized that early voting shortened "[t]he effective period between the filing deadline and the election" by 33 days, *Browne*, 46 P.3d at 419, the Ninth Circuit counted the entire period up to Election Day in dismissing Arizona's administrative interests, Pet. App. 25a.

The federal Uniformed and Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA") has encouraged states to make absentee ballots available as early as 60 or 90 days prior to a federal general election in order to ensure sufficient transit time in military and foreign mail systems. *See* 42 U.S.C. § 1973ff-2(e), (f); *Keith*, 385 F.3d at 737. The United States Department of Justice has sued states under UOCAVA claiming "states must provide no less than thirty days for the round-trip mail transit of a ballot to overseas locations to ensure that voters have a reasonable opportunity to return the ballot in time to be counted." *See, e.g., McCain-Palin 2008 v. Cunningham*, Complaint ¶ 10, No. 3:08CV709 (E.D. Va. Nov. 14, 2008), *available at* http://www.usdoj.gov/crt/voting/misc/va_uocava_comp.php (visited Dec. 9, 2008). The Department of Defense Federal Voting Assistance Program recommends that states allow forty-five days for the round-trip transit of overseas ballots. *Id.*

Furthermore, states must accomplish far more than resolving litigation during these shortened periods. In Arizona and other states, "completed ballots must be translated into numerous Native American languages in order to comply with the Voting Rights Act." *Browne*, 46 P.3d at 420, *citing* 42 U.S.C. §§ 1973 *et seq.* The federal government also has encouraged the replacement of punch card and lever voting machines, *see* 42 U.S.C. § 15302, and regulated electronic voting systems with detailed technology standards, *see* 42 U.S.C. § 15481. Under those standards, states have implemented performance testing and certification of electronic voting systems that must occur after ballot printing but sufficiently in advance of Election Day to correct any errors. *See, e.g.,* Mont. Code Ann. § 13-17-212.

Contrary to *Anderson's* practical analysis of the election process, the Ninth Circuit's decision did not weigh these recent voting reforms, increased litigation, and an expanded campaign calendar. Its mandate, added to these other demands, will further strain local election administration for months leading up to Election Day, and force states nearer to a "one-size-fits-all" election administration system dictated by a rigid constitutional calendar.

CONCLUSION

The Court should grant the writ of certiorari on both questions presented by Petitioner State of Arizona.

Respectfully submitted,

MIKE MCGRATH
Attorney General of Montana
ANTHONY JOHNSTONE
Solicitor
State Bar ID No. 7230
Counsel of Record
State of Montana
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

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